(10)

No. 90-1846-CFX
Status: GRANTED

Title: George F. Denton, Director of Corrections of California, et al., Petitioners
v.
Mike Hernandez

Docketed:
May 30, 1991

Court: United States Court of Appeals for the Ninth Circuit

Counsel for petitioner: Ching,James

Counsel for respondent: Nichols,Richard W.

Entry	Date	Note	Proceedings and Orders
1	May 30 1991	G	Petition for writ of certiorari filed.
2	Jun 28 1991		Brief of respondent Mike Hernandez in opposition filed.
3	Jun 28 1991	G	Motion of respondent for leave to proceed in forma pauperis filed.
5	Jul 2 1991		DISTRIBUTED. September 30, 1991
6	Jul 2 1991		Affidavit of Mike Hernandez in support of motion for leave to proceed in forma pauperis received and distributed.
7	Oct 7 1991		Motion of respondent for leave to proceed in forma pauperis GRANTED.
9	Oct 28 1991		REDISTRIBUTED. November 1, 1991
10	Nov 4 1991		Petition GRANTED.
			**********
11	Nov 8 1991	G	Motion of respondent for appointment of counsel filed.
12	Nov 18 1991		Motion for appointment of counsel GRANTED and it is ordered that Richard W. Nichols, Esquire, of Sacramento, California, is appointed to serve as counsel for the respondent in this case.
13	Nov 18 1991	G	Motion of petitioners to dispense with printing the joint appendix filed.
14	Dec 9 1991		Motion of petitioners to dispense with printing the joint appendix GRANTED.
17	Dec 12 1991		Brief of petitioners George Denton, et al. filed.
15	Dec 19 1991		Brief amicus curiae of United States filed.
16	Jan 2 1992		SET FOR ARGUMENT MONDAY, FEBRUARY 24, 1992. (3RD CASE)
18	Jan 13 1992		Brief amici curiae of American Civil Liberties Union, et al. filed.
20	Jan 15 1992		Reply brief of petitioner George Denton filed.
19	Jan 17 1992		Brief of respondent Mike Hernandez filed.
21	Jan 24 1992		CIRCULATED.
22	Feb 6 1992		Record filed.
		*	Partial proceedings and briefs U.S. Court of Appeals, Ninth Circuit.
24	Feb 14 1992	X	Supplemental brief of petitioner George F. Denton filed.
23	Feb 19 1992		Record filed.
		*	Original record proceedings U.S. District Court for the Eastern District of California. (Two Volumes) (1 Box)
25	Feb 24 1992		ARGUED.

COPY

NO. 90-1846

Supreme Court, U.S.
FILED
MAY 30 1991
OFFICE OF THE CLERK

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1991

GEORGE F. DENTON, et al., Petitioners,

v.

MIKE HERNANDEZ, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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of the State of California
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QUESTION PRESENTED

Whether a Federal District Court may dismiss a complaint pursuant to 28 U.S. Code section 1915(d) if it finds the complaint wholly fanciful despite the fact that reliance was not made on judicially noticeable facts, i.e. facts of which are generally known or ascertainable by reference to a readily available, accurate source.

LIST OF PARTIES

When respondent filed his actions, petitioner George F. Denton was director of the California Department of Corrections, Eddie Ylst was superintendent of the California Medical Facility, and Lieutenant Hartman, Sergeants Anderson and Ingle, and Officers Fitzgerald, McIntyre, Perdoni, Price and Tomlinson were serving at the California Medical Facility. Petitioner Paul J. Morris was warden of Folsom State Prison, and Lieutenants Gonzales and Rutherford, Mr. Tomasetti and Officer Lee were serving at Folsom State Prison.

Respondent Mike Hernandez was and continues to be a prisoner confined within the California Department of Corrections.

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NO. _____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1991

GEORGE F. DENTON, et al.,

Petitioners,

v.

MIKE HERNANDEZ,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners, George F. Denton, et al., pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on November 21, 1990, as amended on April 10, 1991.

OPINIONS BELOW

The opinion for the Court of Appeals for the Ninth Circuit and order of amendment are reported at ___ F.2d ___ and is reprinted in the appendix submitted with this Petition. Appendix. The slip opinion is paginated from 4621 through 4633.

The order of amendment filed by the Ninth Circuit on April 10, 1991 and reproduced in the Appendix makes certain corrections in the language of the opinion and denies a sua sponte request by a judge of the Ninth Circuit for an en banc hearing. Appendix.

This matter has been presented to this Court on petition for certiorari based upon an earlier decision of the Ninth Circuit, Hernandez v. Denton, 861 F.2d 1421 (9th Cir. 1988) hereinafter Hernandez I. This Court granted the petition and remanded the matter to the Ninth Circuit for further consideration in light of Neitzke v. Williams, 491 U.S. ___, 109 S.Ct. 1827, 49 CCH S.Ct. Bull. B2245 (1989). The instant opinion is the result of that remand. The unamended opinion is Hernandez v. Denton, 919 F.2d 573 (9th Cir. 1990).

JURISDICTION

The Ninth Circuit rendered its opinion and entered judgment on November 21, 1990. The Ninth Circuit, after consideration of a sua sponte request for en banc hearing by a justice of the circuit and briefing by the parties on

the desirability of en banc hearing, denied such a hearing on April 10, 1991. This petition is filed within 90 days of that date.

The jurisdiction of this court to review the judgment of the Ninth Circuit is invoked under 28 U.S.C. section 1254(1).

STATUTE INVOLVED

The statute involved is subdivision (d) of 28 U.S.C. 1915, related to proceedings in forma pauperis, which reads as follows:

> "The court may request an attorney to represent any such person unable to employ counsel and may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious."

STATEMENT OF THE CASE

Prior to 1986, respondent, a state prisoner proceeding pro se, had filed five separate civil rights complaints pursuant to 42 U.S.C. section 1983. On April 17, 1986, the magistrate of the United States District Court for the Eastern District of California filed findings and recommendations that these complaints be dismissed pursuant to 28 U.S.C. section 1915(d). On May 5, 1986, the district court entered judgment against respondent.

The various allegations in these complaints are set out in some detail in the dissent to the Ninth Circuit's 1988 decision. Hernandez v. Denton, 861 F.2d 1421, 1433-1438 (9th Cir. 1988). For purposes of this petition the important allegations are that respondent was raped 28 separate times over a period of more than two years in two separate prisons without once knowing at the time that he was being raped. Respondent claims that these assaults occurred at Folsom Prison and the California Medical Facility and were committed by both inmates and correctional officers, but he alleges no fact capable of establishing that any of the named defendants assaulted him. He has no personal recollection of any of the assaults but deduces that they occurred from his claimed discovery of fecal and semen stains on his T-shirts and perceived needle wounds on his arms and legs. Respondent has been diagnosed as requiring psychiatric treatment and is presently a patient at the Atascadero State Hospital. Id. at 1436-1438; Hernandez v. Denton, __ F.2d __, slip opn. at 4626, 4630, hereinafter Hernandez II.[1/]

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1. The transcript of Mr. Hernandez's own version of an assault is contained in a published opinion issued on April 10, 1991. Hernandez v. Ylst, ___F.2d___, No. 88-6459, slip opn. at ftn. 4, 4589-4591 (9th Cir. 1991). Mr. Hernandez, on habeas corpus after a state court criminal conviction, sought to have the conviction overturned because the trial court had not instituted proceedings to determine his competency to stand trial. Id. at 4588. The Ninth Circuit ruled that there was no substantial doubt of competency. Id. at 4589. Inter alia, Mr. Hernandez cited his trial court statement regarding

Respondent appealed the dismissal of his cases to the Ninth Circuit, and on November 23, 1988, that court reversed the district court and held, among other things, that the district court could not dismiss the rape allegations under section 1915(d) on the ground that a court may find a complaint "wholly fanciful" and without substance in law or fact only if the facts alleged are impossible in light of a judicially noticeable fact and that the court could not take judicial notice that none of these alleged rapes occurred. Hernandez v. Denton, 861 F.2d 1421, 1426-1427 (9th Cir. 1988).

This Court vacated the 1988 opinion and remanded the matter for further consideration in light of Neitzke v. Williams, 491 U.S. ___, 109 S.Ct. 1827 (1989). The Ninth Circuit issued a second opinion on November 21, 1990, and denied en banc hearing on April 10, 1991. This decision, Hernandez II, is neither sound law nor consonant with this Court's 1989 order on remand. The present decision does not comport with Neitzke and will adversely affect the ability of district courts to handle the growing problem of prisoner pro se litigation because, as a practical matter, it admits of no discretion in the District Court to dismiss a fantastic complaint as frivolous under 28 U.S.C. section 1915(d).

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the in-custody rapes as proof of his own incompetency. Id. at 4589-4591, ftn. 4.

ARGUMENT

THE GRANTING OF CERTIORARI IS NECESSARY BECAUSE THE NINTH CIRCUIT'S DECISION IN HERNANDEZ II FAILS TO CONFORM WITH THIS COURT'S DECISION IN NEITZKE AND THEREFORE THE NINTH CIRCUIT HAS FAILED TO COMPLY WITH THIS COURT'S 1989 REMAND ORDER

This case concerns the dismissal of Mr. Hernandez's complaint because it contained, in the district court's opinion, that the rape allegations in the complaint were frivolous under 28 U.S.C. section 1915(d). The allegations were that he was homosexually raped 28 times at both Folsom Prison and the California Medical Facility, Vacaville. Mr. Hernandez, based on his "sleeping late and finding fecal stains on a tee-shirt" (Hernandez I, supra at 1435), and needle marks (Hernandez II at 4630; Appendix, p. A-12), concluded that certain correctional personnel, including the warden of the prison, were responsible for the rapes. See also, Hernandez v. Ylst, __ F.2d ___, No. 88-6459, slip opn. at ftn. 4, 4589-4591 (9th Cir. 1991). Mr. Hernandez had no personal recollection of having experienced these assaults. Hernandez II at 4630; Appendix, p. A-12.

The Hernandez II opinion rejects the possibility that a dismissal for frivolity may be based on "law, human

behavior, or permissible inferences" (Hernandez I, supra at 1429) and arbitrarily and without authority adopts a standard more restrictive that announced in Neitzke. In doing so, the Ninth Circuit failed to do what this Court ordered in 1989, i.e. reconcile and conform its decision to this Court's holdings in Neitzke. Instead, the Ninth Circuit has issued an opinion which distorts Neitzke and the leading Circuit precedent, Franklin v. Murphy, 745 F.2d 1221 (9th Cir. 1984), and evades the uniform and simple rules governing the interpretation of section 1915(d).

Clearly the Ninth Circuit did not misapprehend the issues. Hernandez II at 4626-4627 states:

> The Supreme Court in Neitzke said that under section 1915 judges may dismiss as frivolous not only claims based on patently meritless legal arguments, but those premised on baseless factual allegations as well. This holding is fully consistent with the prior law of this circuit. See Franklin, 745 F.2d at 1227. The defendants now focus on the Supreme Court's statement in Neitzke that examples of baseless factual claims are "fantastic or delusional scenarios." 109 S.Ct. at 1833. The defendants ask us to hold that Hernandez['s] allegations of 28 rapes are "fantastic or delusional scenarios," and affirm the district court's dismissal.

However, Hernandez II interprets Neitzke to state that a claim cannot qualify as patently[2/] "delusional" or "hallucinatory" unless it rests upon facts which the court knows could not have occurred. The Ninth Circuit concludes that unless these foundational facts are amenable to judicial notice under Rule 201(b) of the Federal Rules of Evidence as generally known or capable of ascertainment by reference to accurate sources, no case may be dismissed under section 1915(d) and Neitzke. Hernandez II at 4627; Appendix, p. A-8.

Framed in this fashion, the conclusion in the instant case is foregone. Because the Ninth Circuit could not "conclude that the plaintiff's claims of rape are contrary to any facts that are 'generally known' [or] ascertain the truth of the [plaintiff's] allegations by looking to any readily available, accurate source," the Court held that the district court had erred in dismissing the rape claims.[3/]

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2. It is unclear where the "patent" language came to modify "delusional" or "hallucinatory" with regard to section 1915(d). Neitzke makes reference to a "patently insubstantial complaint" being liable to dismissal under Rule 12(b)(6) and not section 1915(d). Neitzke, supra at ftn. 6, B2254.

3. The Ninth Circuit's own opinion issued on the same day as the instant case order involving the same Mr. Hernandez (Hernandez v. Ylst, supra at ftn. 1) should be susceptible of judicial notice in this case. That case involved Mr. Hernandez's assertion that his prior statement regarding in-custody rape was proof of his own incompetency. Id. at 4589, 4591. This would seem to be

Hernandez II, supra. Further, the Ninth Circuit rejected the concept that the aggregate of 28 rapes amounted to frivolity and stated (Hernandez II, supra):

> If we were to affirm the district court's dismissal of all the claims as factually frivolous . . . , we would have to hold that all 28 rapes were delusions and that none of them occurred. While it is hard to believe that so many similar incidents actually happened, we cannot say that none of them occurred without making the kinds of credibility determinations that are impermissible in deciding whether a claim is baseless under section 1915.[4/]

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a significant fact, readily determinable from an unimpeachable source, that could be taken into account when deciding whether "all 28 rapes" alleged in the Hernandez II complaint were delusional. Yet although Hernandez v. Ylst refers to the "amaranthine" Hernandez II suit (id. at ftn. 1, 4586-4587), Hernandez II does not refer to the Ylst case. Moreover, there is no reasonable explanation why the Ninth Circuit's unpublished opinion involving Mr. Hernandez (Hernandez v. Whiting, No. 88-6743, 1991 U.S. App. Lexis 3282 (9th Cir. Dec. 7, 1991)) would not also have provided some cognizable facts under the Hernandez II judicial notice rule. In Hernandez v. Whiting, the Ninth Circuit found frivolous Mr. Hernandez's contention that he was forced to eat food loaded with heroin.

4. This passage is particularly troubling. The Ninth Circuit seems to be saying that an allegation of 28 rapes is 28 times more credible than an allegation of one

A considered examination of Neitzke reveals the Ninth Circuit's misinterpretation of that case. We should not have to cite to an objective source in order to conclude that Mr. Hernandez's 28 rapes could not occur. The discretion accorded to our trial courts in the light of human experience should be sufficient to ratify allegations so "hard to believe." Under the guise of reconciliation with Franklin and its progeny, the Ninth Circuit has eviscerated the clear holdings of Neitzke and created its own idiosyncratic interpretation of section 1915(d).

The Ninth Circuit, in the years before Neitzke, held that the "legal component of the 1915(d) frivolity standard is . . . similar to the test for dismissal of pro se complaints for failure to state a claim." Franklin v. Murphy, supra at 1228. Moreover, Franklin holds that a complaint may be dismissed as frivolous even if it states a claim, including those "postulating events and circumstances of a wholly fanciful kind." Id., quoting Taylor v. Gibson, 529 F.2d 709, 717 (5th Cir. 1976). Finally, Franklin also holds that a

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because the allegation of 28 increases the likelihood that the complainant is telling the truth. In short, the Court appears to be saying that because a single rape may have occurred in any given case, it is 28 times harder to find that 28 didn't occur. This is nonsense. Inter alia, the Court must have made a forbidden "credibility judgment" in assuming that an allegation of one rape under the given circumstances was likely enough to survive the frivolity test. Finally, the passage assumes that all credibility judgments are forbidden under Nietzke and Franklin, when in fact it appears that this rule appears ex visitatione dei in Hernandez II.

defense inferable from the record may be a basis for dismissal. Franklin, supra at 1228.

Neitzke itself states that a complaint is "frivolous" on its facts if the allegations are "fanciful". Neitzke, supra at B2252. The district courts are authorized, within their discretion, "to pierce the veil of the complaint's factual allegations and dismiss those claims whose factual contentions are clearly baseless." Id. at B2254. These factually deficient allegations comprise a class of "fantastic or delusional scenarios." Id. The language does not forbid subjective evaluations within the discretion of the district courts.

The reader of both Franklin and Neitzke will be at a loss to explain the genesis of the holding in Hernandez II that judicial notice is the exclusive means by which judgments about the fancifulness, fantasticality, or delusionality of allegations can be made. As stated in the dissent in Hernandez I, Franklin at best is authority for two separate possible bases for dismissing a complaint as frivolous, the "wholly fanciful" and the "judicial notice" test. Hernandez I at 1430 (Aldisert, J., dissenting). Indeed, the dissent in Hernandez I sets forth a careful explanation of why judicial notice alone cannot be the rule and the majority opinion in Hernandez II makes no attempt to deal with the dissenter's cogent arguments.

The implication of the exclusive use of judicial notice is that district courts cannot be trusted with discretion in this area and that a wealth of judicial experience cannot be

brought to bear on any given complaint.[5/] This must be the basis of the majority's forbidding of "credibility judgments." Surely the majority does not use the term as one of art, as no party urges that the matters alleged be finally decided based upon the sworn evidence brought before it. Rather, the majority engages in hyperbole and utilizes "credibility" when it means "probity." It is not scripture that certain allegations pass the bounds of rationality, but such judgments may be made on experience. Was the district court in this case required to cite an authority that Mr. Hernandez produces clearly baseless allegations, or that people with Mr. Hernandez's mental problems in general produce delusional accusations? There is no authority in either Franklin or Neitzke for such cumbersome and absurd mental gymnastics. Neitzke refers only to the discretion[6/] of the district courts with regard to

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5. In In re Amendment to Rule 39, __U.S.__, 1991 U.S. Lexis 2431 (Apr. 29, 1991) and In re Sindram, _ U.S.__, 111 S.Ct. 596, 598 (1991), this Court stated that abusive, repetitive applications for relief by a single individual would be held frivolous. The basis for these holdings is clearly a concern with the flood of frivolous complaints clogging the lower courts. Mr. Hernandez's case would be an opportunity for this Court to place as reasonable a limitation on the individual complainant with multiple fantastic allegations as this Court did on the individual who files multiple complaints.

6. We need not fear the untrammeled exercise of discretion by the district courts. Review of frivolity dismissals is de novo on appeal. Jackson v. Arizona, 885 F.2d 639, 640 (9th Cir. 1989).

"fantastic or delusional scenarios, claims with which federal district judges are all too familiar [Emphases added]." Id. at B2254.

Hernandez II does little to comply with this Court's order to consider the instant case in light of Neitzke. In fact, by engrafting an exclusive judicial notice test upon Neitzke, Hernandez II ensures that no cases with outlandish allegations could ever be dismissed for frivolity.[7/] Rather than allowing a district court to "pierce the veil of the complaint's factual allegations," the Ninth Circuit has removed all discretion with regard to frivolity based on factual allegations. Given that this is the second round of Supreme Court litigation on this subject, this Court should be concerned with the grudging and nominal compliance on the part of the Ninth Circuit with this Court's original order to conform Hernandez I to Neitzke. As stated by the dissenter, "The Supreme Court sent us a message by unanimous action [and] I am not at all certain that the majority have opted to hear it, let alone heed it." Hernandez II at 4629 (Aldisert, J., dissenting) (Appendix,

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7. The Ninth Circuit has in fact allowed exceptions to its own harsh rule, but, it appears, only in unpublished cases. Hernandez v. Whiting, supra, another of Mr. Hernandez's cases involved the alleged forced feeding of heroin-laced food. The Ninth Circuit found the Whiting case frivolous. Similarly, the Ninth Circuit found frivolous allegations that the government had made an inmate the experimental subject of gassing experiments (Morris v. FBI, No. 90-55813, 1991 U.S. App. Lexis 1296 (9th Cir. Jan. 28, 1991). The analogy to the instant allegations is strong.

p. A-11). A reading of Hernandez II indicates that the "message" must at least be repeated by this Court to ensure that it finally gets across.

CONCLUSION

The decision in Hernandez II places unwarranted restrictions upon the discretion of the district courts in dismissing actions under section 1915(d) contrary to the plain meaning of Neitzke. Hernandez II does not conform to the spirit or letter of this Court's 1989 remand order and certiorari must once again be granted to ensure that this Court's mandates are obeyed in a uniform manner by all the Circuits.

DATED: May 24, 1991

Respectfully submitted,

DANIEL E. LUNGREN, Attorney General
of the State of California
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ORIGINAL SIGNED BY

JAMES CHING, Supervising
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Attorneys for Petitioners

APPENDIX

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Mike Hernandez, Plaintiff-Appellant, v. George F. Denton, Director of Corrections; Paul J. Morris, Warden, Eddie Ylst, in his official and individual capacity; Mr. Hartman, Defendants-Appellees.	Nos. 86-2139 87-1693/1694 D.C. Nos. CIV S-83-645-LKK CV-S-83-1348-LKK CV-S-85-0084-LKK ORDER AND AMENDED OPINION

On Remand from the United States
Supreme Court

Filed November 21, 1990
Amended April 10, 1991

Before: Ruggero J. Aldisert,* J. Clifford Wallace and Mary M. Schroeder, Circuit Judges

Opinion by Judge Schroeder; Concurrence by Judge Wallace; Dissent by Judge Aldisert

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*Honorable Ruggero J. Aldisert, Senior United States Circuit Judge for the Third Circuit, sitting by designation.

SUMMARY

Courts and Procedure

Affirming in part, reversing and remanding a district court judgment of dismissal, the court of appeals held that appellant should be permitted to amend his claims to provide more specific recitations of those facts alleged to have violated constitutional standards.

Appellant Mike Hernandez, a prisoner, brought suits in forma pauperis against prison officials alleging a violation of his eighth amendment rights, procedural due process violations, claims of rape, other physical abuse, and deprivation of footwear. The district court dismissed all the claims as frivolous. In a first appeal, the court unanimously affirmed the district court dismissal of Hernandez' procedural due process claims, and his claim that prison officials violated his eighth amendment rights. The court held that no amendment could cure the defects in those allegations. However, the majority also reversed dismissal of Hernandez' claims of rape and other physical abuse, holding that it was improper for the district court to dismiss a pro se complaint as frivolous under 28 U.S.C. § 1915 unless claims were patently meritless, i.e., having no arguable substance in law of fact. The Supreme Court, however, vacated the disposition in this case and remanded for further consideration in light of *Neitzke v. Williams.* In that case, the Supreme Court held, as the majority of the court originally held in this case, that the standard of frivolousness is not the same as the Rule 12(b)(6) standard, and that a complaint should not be dismissed under section

1915 simply because it fails to state a claim. The Supreme Court stated that a complaint is frivolous when it lacks an arguable basis either in law or fact, and that section 1915 embraces not only the inarguable legal conclusion, but also the fanciful factual allegation.

[1] Because Hernandez' allegations that he was drugged and raped twenty-eight times by inmates and prison officials lacked factual recitations of time and place and persons responsible, the complaints failed to state rape claims upon which relief could be granted under Rule 12(b)(6). Nevertheless, because Hernandez' allegations raise constitutional concerns, the claims were not patently without legal substance. Although the claims involved some exaggeration, a majority of the court was unable to say with certainty that none of them occurred, and that the claims were therefore lacking in any factual basis so as to be deemed fanciful under section 1915(d). The appellees asked for reconsideration of that ruling in light of the Supreme Court's remand. [2] Appellees focused now on the Supreme Court's statements in *Neitzke* that examples of baseless factual claims are "fantastic or delusional scenarios." However, were the court to affirm the district court dismissal of all the claims as factually frivolous, the court would have to hold that all twenty-eight rapes were delusions and that none of them occurred. The court could not say that none of them occurred without making the kinds of credibility determinations that are impermissible in deciding whether a claim is baseless under section 1915. [3] Under *Neitzke*, the court did not believe that a claim could qualify as patently delusional or hallucinatory unless it rested upon facts that the court knew could not have

occurred. The court could not conclude that Hernandez' claims of rape were contrary to any facts that are generally known, nor could the court ascertain the truth of the allegations by looking to any readily available, accurate source. Thus, the court concluded that the district court erred in dismissing the rape claims at this stage of the litigation as fanciful. [4] Hernandez should be permitted to amend the claims to provide more specific factual recitations of the time and place of each of the rapes and conduct on the part of prison officials that violated his constitutional rights. Only when it is clear that a claim lacks legal or factual basis may it be dismissed as frivolous. It was not yet apparent that those claims lacked either legal or factual basis.

Judge Wallace concurred for the reasons stated in his prior concurrence.

Dissenting, Judge Aldisert stated that no amendment of facts could cure the claims advanced by Hernandez, given the detailed facts already set forth, the theory advanced, and the inferences required. Judge Aldisert would affirm the judgment of the district court essentially for the reasons set forth in his previous separate opinion.

COUNSEL

Richard W. Nichols, McDonough, Holland & Allen, Sacramento, California, for the plaintiff-appellant.

Richard Thomson, Supervising Deputy Attorney General, Sacramento, California, for the defendants-appellees.

ORDER

Upon filing of the Opinion on November 21, 1990, a sua sponte request for en banc was made by a Judge of this circuit. The parties filed simultaneous briefs setting forth their respective positions on whether the case should be reheard en banc. The full court voted on whether to take the case en banc and the majority voted not to take the case en banc. The petition for rehearing en banc is rejected.

The Opinion of Judge Schroeder filed on November 21, 1990 is amended as follows: on slip Opinion page 14375, first full paragraph, omit the first sentence beginning "The appellant should" and ending with the word "standards." In that same paragraph, following the citation to "Neitzke", insert "Jackson v. Arizona, 885 F.2d 639, 640 (9th Cir. 1989)."

OPINION

SCHROEDER, Circuit Judge:

The Supreme Court vacated our original divided disposition in this case, reported at 861 F.2d 1421 (9th Cir. 1988) and remanded for further consideration in light of Neitzke v. Williams, 491 U.S. __, 109 S.Ct. 1827 (1989). We have given further consideration after requesting briefs from the parties as to the bearing of that decision on this case.

The appellant, Mike Hernandez, is a prisoner proceeding in forma pauperis in suits against prison officials. At issue are the district court's dismissals of complaints alleging 42 U.S.C. § 1983 violations. The district court dismissed all the claims as "frivolous" under 28 U.S.C. § 1915(d) and Hernandez appealed.

In our original opinions, we unanimously affirmed the district court's dismissal of plaintiff's procedural due process claims and his claim that prison officials violated his eighth amendment rights by depriving him of a mattress for one night. We held that no amendment could cure the defects in those allegations. See Franklin v. Murphy, 745 F.2d 1221, 1228 n.9 (9th Cir. 1984). Those rulings are not affected by the subsequent grant of the defendants' petition for certiorari.

In the original opinions, a majority also reversed the district court's dismissal of Hernandez' claims of rape, other physical abuse, and deprivation of footwear. The majority held that it was improper for a district court to dismiss a pro se complaint as frivolous under section 1915 unless claims were "patently meritless." We also held that the standard of "frivolousness" of section 1915(d) is not the same as the Federal Rules of Civil Procedure 12(b)(6) legal standard for dismissal for failure to state a claim. Hernandez, 861 F.2d at 1425. Relying upon this court's decision in Franklin, we held that a pro se prisoner complaint may not be dismissed under section 1915 unless it has no "'arguable substance in law [or] fact.'" Hernandez, 861 F.2d at 1425, quoting Franklin, 745 F.2d at 1227.

The Supreme Court has no held in Neitzke, as a majority of us originally concluded in this case, that the standard of "frivolousness" is not the same as the Rule 12(b)(6) standard, and that a complaint should not be dismissed under section 1915 simply because it fails to state a claim. The Supreme Court cited with approval our decision in Franklin v. Murphy in holding that a complaint is frivolous when "it lacks an arguable basis either in law or in fact" and that section 1915 "embraces not only the inarguable legal conclusion, but also the fanciful factual allegation." Neitzke, 109 S.Ct. at 1831.

In this case, the most troublesome allegations are appellant's claims that he was drugged and homosexually raped over twenty times by inmates and prison officials at different prisons. Because the claims lacked factual recitations of time and place and persons responsible, the complaints failed to state rape claims upon which relief could be granted under the Rule 12(b)(6) standard. Nevertheless, because rape by prison guards or deliberate indifference by prison guards to rape by inmates would raise constitutional concerns, the claims were not patently without legal substance. Although the claims of such repeated similar events undoubtedly involved some exaggeration, a majority of us were unable to say with certainty that none of them occurred and that the claims were therefore lacking in any factual basis so as to be deemed "fanciful" under section 1915(d).

The appellees now ask us to reconsider that ruling in light of the Supreme Court's remand. The Supreme

Court in Neitzke said that under section 1915 judges may dismiss as frivolous not only claims based on patently meritless legal arguments, but those premised on baseless factual allegations as well. This holding is fully consistent with the prior law of this circuit. See Franklin, 745 F.2d at 1227. The defendants now focus on the Supreme Court's statement in Neitzke that examples of baseless factual claims are "fantastic or delusional scenarios." 109 S.Ct. at 1833. The defendants ask us to hold that Hernandez' allegations of 28 rapes are "fantastic or delusional scenarios," and affirm the district court's dismissal. If we were to affirm the district court's dismissal of all the claims as factually frivolous, however, we would have to hold that all 28 rapes were delusions and that none of them occurred. While it is hard to believe that so many similar incidents actually happened, we cannot say that none of them occurred without making the kinds of credibility determinations that are impermissible in deciding whether a claim is baseless under section 1915. See Franklin, 745 F.2d at 1228.

Under Neitzke, we do not believe that a claim can qualify as patently "delusional" or "hallucinatory" unless it rests upon facts which the court knows could not have occurred. The provision for judicial notice in Federal Rule of Evidence 201 provides guidance. It states: "A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). We accept this as one useful standard in determining

whether a claim is patently frivolous as "founded on wholly fanciful factual allegations." Hernandez, 861 F.2d at 1426 (quotation omitted). We cannot conclude that the plaintiff's claims of rape are contrary to any facts that are "generally known," nor can we ascertain the truth of the allegations by looking to any readily available, accurate source. We therefore conclude that the district court in this case erred in dismissing the rape claims at this stage of the litigation as fanciful.

Only when it is clear that a claim lacks legal or factual basis may it be dismissed as frivolous. Neitzke, 109 S.Ct. at 1331. Jackson v. Arizona, 885 F.2d 639, 640 (9th Cir. 1989). Accordingly, while we affirm the district court's dismissal of appellant's procedural due process claim and his eighth amendment claim based upon deprivation of a mattress, we reverse the district court's dismissal of the remainder of the claims. It is not yet apparent that those claims lack either legal or factual basis.

AFFIRMED in part; REVERSED and REMANDED in part.

WALLACE, Circuit Judge, concurring:

I concur for the reasons stated in my prior concurrence, Hernandez v. Denton, 861 F.2d 1421, 1427 (9th Cir. 1988). For clarification, I eliminate the last ten words of the concurrence.

ALDISERT, Circuit Judge, dissenting:

The issue that divides this panel in this remand from the Supreme Court is whether the allegations contained in a pro se complaint filed by an inmate at the Atascadero State Hospital can ever survive the barrier imposed by 28 U.S.C. § 1915(d) authorizing the district court to dismiss a claim filed in forma pauperis "if satisfied that the action is frivolous." Atascadero is a state hospital for the criminally insane and mentally disordered.

The majority refuse to meet the issue head on and prefer to remand to the district court to permit this obviously very disturbed inmate to file an amended complaint. They conclude that this unfortunate state prisoner should have the opportunity "to amend the claims to provide more specific factual recitations of the time and place of each of the rapes and conduct on the part of prison officials which violated constitutional standards."

I believe that no amendment can save Hernandez' fanciful claims. I reiterate the views set forth extensively in my previous dissenting opinion in Hernandez v. Denton, 861 F.2d 1421, 1427-40 (9th Cir. 1988) (Aldisert, J., dissenting), and would hold that no amendment of facts can cure the claims advanced by Hernandez, given the detailed facts already set forth, the theory advanced and the inferences required. I stated then and repeat now that "[t]he grand purpose of prisoner civil rights petitions under section 1983 . . . should not be prostituted by the hallucinations of a troubled man." 861 F.2d at 1440. I would affirm the judgment of the district court dismissing

the complaint essentially for the reasons set forth in my separate opinion previously published at 861 F.2d at 1427-40. I believe my position in Hernandez has been endorsed sub silentio by the court in its remand to us. In the words of Marshal McLuhan, "The medium is the message."

I.

The Supreme Court sent us a message by unanimous action. I am not at all certain that the majority have opted to hear it, let alone heed it. The Court directed the majority to reconsider this case in light of Neitzke v. Williams, 491 U.S. __, 109 S.Ct. 1827, 54 U.S.L.W. 4493 (1989). Because our previous statement of applicable law -- expressed by both the majority and the dissent -- is on all fours with the Court's decision and opinion in Neitzke, there can be no reason for the Court to have granted certiorari and remanded for reconsideration unless it was troubled with the majority's decision to remand to permit further amendment. Having agreed completely with the majority's statement of the law, the Court would have no purpose for vacating our judgment and remanding unless it was convinced that the dissent was correct in reaching the conclusion that it was impossible to amend the complaint to assert a viable cause of action. Significantly, after reconsideration, the majority proceed as if the Court did not remand this case to us; indeed, the majority opinion responds now only to the contentions of the appellee and does not address any possible concerns of the Court.

I am convinced that my original views, although again rejected by the panel's majority, have now been

endorsed by the unanimous decision of the Supreme Court in granting certiorari and remanding to us.

II.

Accordingly, some summary of the detailed facts alleged in Hernandez' complaint is in order. He claims that he was homosexually raped 28 times at both Folsom Prison and Vacaville. He reached this conclusion because he found fecal stains on his tee-shirt and needle marks on his arms that he believed were "signs of rape." He has no personal recollection of having experienced these assaults. I have previously observed that "[i]rrespective of the outcome of this litigation, it must be acknowledged that Hernandez has established a world record capable of qualifying for the Guiness Book of Records: the only person who has been raped 28 separate times without knowing at the time that this was happening to him." 861 F.2d at 1438.

No possible amendment can cure the fatality of his claim because the circumstantial evidence relied upon cannot as a matter of law rise to the dignity of a cause of action. I previously have demonstrated the fatal flaws of the arguments advanced:

> [H]is complaints are utterly devoid of any allegations establishing the personal involvement of any of the defendants. His contentions depend upon the following prosyllogisms and episyllogisms:

A.

Major Premise: Some needle marks are signs of drug injection.
Minor Premise: I awoke with some needle marks.
Conclusion: Therefore, I was drugged.

B.

Major Premise: One who is drugged can be raped without his knowledge.
Minor Premise: I was drugged.
Conclusion: Therefore, I was raped.

C.

Major Premise: Those correctional officials who are involved in or knowledgeable of inmate rapes are liable.
Minor Premise: Defendants are correctional officials.
Conclusion: Therefore, defendants are liable.

Both fallacies of form and material fallacies inhere in each of these three arguments.

861 F.2d at 1438-39; see also R. Aldisert, Opinion Writing 127 (West 1990). For a discussion of the failures in logic evidenced in these arguments and his companion allegations of rape based on presence of fecal stains and semen on his underclothes, see R. Aldisert, Logic for Lawyers: A Guide to Clear Legal Thinking 141-43, 147-54, 193-207 (Clark Boardman 1989). The brute fact is that no possible amendment of his already "specific factual recitations" can surmount the defects in the theory upon which Hernandez bases liability.

III.

As the majority now suggest, the test of frivolousness is not measured only by dictates of judicial notice. I previously have referred to this court's leading case of Franklin v. Murphy, 745 F.2d 1221 (9th Cir. 1984):

> This analysis sets out three possible standards for dismissing a complaint as frivolous: 1) does the complaint recite bare legal conclusions without supporting facts? 2) does the complaint postulate wholly fanciful events or circumstances? 3) does the complaint conflict with facts of which a court may take judicial notice? (A fourth standard -- redundancy -- was added by Tripati v. First Nat'l Bank & Trust, 821 F.2d 1368, 1370 (9th Cir. 1987) . . . .

As I read Franklin, the "wholly fanciful" and "judicial notice" standards are two separate possible bases for dismissing a complaint as frivolous. Under Franklin, a court may indeed dismiss an action as frivolous if it is "dependent upon allegations which conflict with facts of which a district court may take judicial notice." Schroeder op. at 1426. However, a court may also dismiss as frivolous an action "postulating events or circumstances of a wholly fanciful kind." Franklin at 1228. I find Hernandez' allegations to be indisputably wholly fanciful.

Hernandez v. Denton, 861 F.2d at 1430 (Aldisert, J. dissenting).

IV.

In Neitzke v. Williams, 491 U.S. __, __, 109 S.Ct. 1827, 1832-33, 54 U.S.L.W. 4493, 4496 (1989), the Court has explained:

> Section 1915(d) is designed largely to discourage the filing of, and waste of judicial and private resources upon, baseless lawsuits that paying litigants generally do not initiate because of the costs of bringing suit and because of the threat of sanctions for bringing vexatious suits under Federal Rule of Civil Procedure 11. To this end, the statute accords judges not only the authority to dismiss a claim based on an indisputably meritless legal theory, but also the unusual power to pierce the veil of the complaint's

factual allegations and dismiss those claims whose factual contentions are clearly baseless. Examples of the former class are claims against which it is clear that the defendants are immune from suit, see, e.g., Williams v. Goldsmith, 701 F.2d 603 (CA7 1983), and claims of infringement of a legal interest which clearly does not exist, like respondent Williams' claim that his transfer within the reformatory violated his rights under the Due Process Clause. Examples of the latter class are claims describing fantastic or delusional scenarios, claims with which federal district judges are all too familiar.

I believe that the claims of Hernandez here, a sick man transferred from Folsom Prison to the Atascadero State Hospital for psychiatric treatment, constitute a paradigm of what the Court describes as "fantastic or delusional scenarios, claims with which federal district judges are all too familiar." I am convinced that this is the only reason the Court remanded the case to us.

Accordingly, I continue to dissent and would affirm the judgment of the district court.

ORIGINAL

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

GEORGE F. DENTON, et al.,

Petitioners,

v.

MIKE HERNANDEZ,

Respondent,

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

(9)

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Mike Hernandez, respondent in the above-captioned proceeding, by and through counsel appointed for him by the United States Court of Appeals for the Ninth Circuit, does herewith submit his brief in opposition to the petition of George F. Denton, et al., for certiorari to said United States Court of Appeals.

OPINIONS BELOW

The original opinion of Ninth Circuit in Hernandez v. Denton ("Hernandez I") appears at 861 F.2d 1421 (9th Cir. 1988). On a previous petition for certiorari (No. 88-2034), this Court vacated the Ninth Circuit's decision and remanded this case to that Court for further consideration in light of Neitzke v. Williams, 490 U.S. 319 (1989). Denton v. Hernandez, __ U.S. __, 110 S.Ct. 37, 107 L.Ed.2d 7 (1989).

The initial opinion of the Ninth Circuit after remand from this Court, Hernandez v. Denton, appears at 919 F.2d 573 (9th Cir. 1990). No party petitioned for rehearing, but a Judge of that Court, sua sponte, requested that the Court consider the case en banc. Ultimately, that Court decided not to review the matter en banc, but the panel slightly modified its initial opinion on remand. A copy of the order declining en banc review and modifying the opinion is appended to petitioners' certiorari petition herein as Attachment 1, and the modified opinion, Hernandez v. Denton ("Hernandez II"), appears at 929 F.2d 1374 (9th Cir. 1991).

JURISDICTION

This Court has jurisdiction over the certiorari petition filed herein, pursuant to 28 U.S.C. §1254(1).

STATUTE INVOLVED

28 U.S.C. §1915(d): "The court may request an attorney to represent any such person unable to employ counsel and may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious." (Emphasis added.)

QUESTION PRESENTED

Petitioners have stated the question presented, as follows:

> "Whether a Federal District Court may dismiss a complaint pursuant to 28 U.S. Code section 1915(d) if it finds the complaint wholly fanciful despite the fact that reliance was not made on judicially noticeable facts, i.e. facts of which [sic] are generally known or ascertainable by reference to a readily available, accurate source."

Respondent believes that a more accurate statement of the issue involved in this case, and the question to be presented, is as follows:

> "What standards should be followed by a United States District Court in determining whether the factual allegations in a complaint filed in forma pauperis pursuant to 28 U.S.C. §1915(a) are "frivolous" within the meaning of 28 U.S.C. §1915(d), and at what point in the proceeding should those standards be applied."

STATEMENT OF THE CASE

Prior to 1986 respondent Mike Hernandez, a state prisoner, had filed five civil rights complaints against various officials and employees of the California Department of Corrections, pursuant to 42 U.S.C. §1983. On numerous occasions the United States District Court for the Eastern District of California had granted Hernandez leave to proceed in forma pauperis, under 28 U.S.C. §1915(a), but had pronounced itself unable to "determine from the present record whether or not plaintiff's claim is frivolous" within the meaning of 28 U.S.C. §1915(d). The District Court had ordered Hernandez to engage in document discovery, pursuant to the Federal Rules of Civil Procedure, to obtain certain requested information.

On April 17, 1986, however, while various discovery motions by Hernandez were pending[1], the United States Magistrate filed findings and recommendations that the cases be dismissed pursuant to 28 U.S.C. §1915(d). On May 5, 1986, the

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[1] Hernandez had sought various documents from his prison medical file, in an effort to obtain evidence which would have tended to support his factual allegations concerning the assaults which are the subject of this proceeding. In light of the dismissal of his actions at the district court level, those discovery motions were never ruled upon.

District Court adopted the Magistrate's recommendation and entered judgments of dismissal as to each of the cases. Hernandez filed notices of appeal as to three of the five cases; in each of those three cases, Hernandez had filed with the Court affidavits from other prisoners which tended, at least in part, to support his factual allegations.

The complaints contained allegations that Hernandez, during night hours while he was asleep, had been drugged and rendered comatose by prison guards, and had then been assaulted and raped in his cell, either by those guards or by other guards or inmates allowed into his cell by those guards. Because of his comatose state, Hernandez did not claim to be able, personally, to identify any of his assailants, although affidavits from other prisoners did assert their abilities to identify some of the persons who had entered his cell. The complaints alleged that Hernandez had sought medical attention for his injuries, and administrative relief prohibiting the commission of further similar assaults, without success. Collectively, the complaints alleged that such events had occurred on 28 occasions over a period of more than two years.

The Magistrate's recommendation for dismissal, which the District Court adopted, was based upon the following rationale contained in the recommendation:

> "The court has concluded that the present five actions lack arguable substance in law or fact and should therefore be dismissed. Although each complaint, taken separately, is not necessarily frivolous, a different picture emerges from a reading of all five complaints together. Plaintiff alleges that both guards and inmates, at different institutions, subjected him to sexual assaults. Despite the fact that different defendants are allegedly responsible for each assault, the purported modus operandi is identical in every case. Moreover, the attacks occurred only sporadically throughout a three year period. The facts thus appear to be 'wholly fanciful' and justify this court's dismissal of the actions as frivolous."

The Ninth Circuit Court of Appeals reversed the dismissals, and remanded the cases to the District Court. Hernandez I, supra, 861 F.2d 1421 (9th Cir. 1988). Three separate opinions were authored by the panel. The lead opinion affirmed the dismissals on certain claims which are not the subject of the present certiorari petition[2], but reversed the dismissals on the subject claims, because those dismissals had been "based upon credibility determinations impermissible under section 1915(d)." Hernandez I, supra, 861 F.2d at 1427. The holding of the lead opinion was to the effect that "[o]nly if the facts alleged are impossible in light of any judicially noticeable fact may the district court find a complaint 'wholly fanciful' and hence without arguable substance in law or fact." Id. at 1426.

The California Attorney General, representing the defendant prison officials and employees, filed a petition for certiorari. Subsequent to Hernandez I, this Court rendered its decision in Neitzke v. Williams, 490 U.S. 319 (1989). Accordingly, this Court granted certiorari, vacated the Ninth Circuit's disposition, and remanded the matter for further consideration in light of Neitzke.

On remand, each of the members of the Ninth Circuit's panel concluded that this Court's decision in Neitzke supported, or at least did not cause a change in, his or her previously-expressed views, and that Court reaffirmed its previous disposition of Hernandez I. Hernandez v. Denton, supra, 919 F.2d 573 (9th Cir. 1990). The lead opinion concluded that

> "Under Neitzke, we do not believe that a claim can qualify as patently 'delusional' or 'hallucinatory' unless it rests upon facts which the court knows could not have occurred." Hernandez v. Denton, supra, 919 F.2d at 575, modified on denial of rehearing en banc in Hernandez II, supra, 929 F.2d at 1376.

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2 The Court of Appeals affirmed the dismissal of Hernandez' claims under the Eighth Amendment, involving allegations of (a) deprivation of a blanket for an unspecified period of time, (b) deprivation of shoes for a month, and (c) physical and verbal abuse by prison officials.

A lengthy dissenting opinion in Hernandez I, commencing at page 1427 of 861 F.2d, had set forth the view that Hernandez' various complaints represented nothing more than "the hallucinations of a troubled man"[3] (861 F.2d at 1440), and that no amendment could cure that problem. On remand, the dissenting judge reaffirmed that view, and opined that his position "has been endorsed sub silentio by the [Supreme] court in its remand to us." Hernandez v. Denton, supra, 919 F.2d at 576, modified on denial of rehearing en banc in Hernandez II, supra, 929 F.2d at 1377.

After the Ninth Circuit as a whole rejected a sua sponte suggestion of one of its members for an en banc rehearing, the panel further modified its decision by striking its prior specific direction that Hernandez be permitted to amend his claims "to provide more specific factual recitations of the time and place of each of the rapes and conduct on the part of prison officials which violated constitutional standards." The California Attorney General, on behalf of the defendant prison officials and employees, has again sought certiorari.

ARGUMENT - CERTIORARI SHOULD NOT BE GRANTED

I. The Effect of this Court's decision in Neitzke v. Williams, 490 U.S. 319 (1989).

In Neitzke v. Williams, 490 U.S. 319 (1989), this Court held that the fact that a pro se complaint fails to state a claim sufficient to withstand a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure ("FRCP") does not automatically render that complaint subject to dismissal, as frivolous, under 28 U.S.C. §1915(d).

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[3] Although the dissent makes several references to Hernandez' place of incarceration as the Atascadero State Hospital, in fact Hernandez is presently incarcerated at Folsom State Prison, and has been for several years.

The instant case represents the next step of the Neitzke analysis. Neitzke establishes the proposition that Rule 12(b)(6) and Section 1915(d) "were devised to serve distinctive goals", and that while the two standards have considerable overlap, they are not identical. Neitzke also establishes that Section 1915(d) accords to district judges "the unusual power to pierce the veil of the complainant's factual allegations and dismiss those claims whose factual contentions are clearly baseless." The Court has even articulated that authority to dismiss complaints under Section 1915(d) would extend, by way of example, to "claims describing fantastic or delusional scenarios, claims with which federal district judges are all too familiar."

The question now presented is how, or on the basis of what standards, a district judge is to conclude that a particular factual claim is "clearly baseless," either because it is "fantastic or delusional" or otherwise.[4] That question has been at the heart of Hernandez' appeal, and a majority of the Court of Appeals panel has concluded that "lack of credibility" and "unlikelihood" are insufficient to qualify within the "clearly baseless" standard. The lead opinion in Hernandez I (pre-Nietzke) answered the standards question, correctly in Hernandez' view, by concluding that a district court must be able to take judicial notice of facts rendering the allegations of the complaint untrue, before that court can dismiss a complaint as factually frivolous under 28 U.S.C. §1915(d). 861 F.2d at 1426. On remand, however, the lead opinion retreated somewhat from that conclusion, by stating that judicial notice pursuant to Rule 201(b), Federal Rules of Evidence, is merely "one useful standard" in making the frivolousness determination.[5] 919 F.2d at 575, modified on denial of rehearing en banc in Hernandez II, supra, 929 F.2d at 1376.

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[4] The present certiorari petition does not appear to raise issues pertaining to the legal sufficiency of Hernandez' claims, as opposed to the question of whether they are factually "baseless."

[5] Petitioners' argument that the Ninth Circuit has limited Section 1915(d) dismissals to situations involving judicially noticeable facts which contradict the complainant's

II. The Meaning of the Term "Frivolous" Under §1915(d).

It is hardly disputable that Hernandez' factual allegations, if true, would be sufficient to state a claim for relief, against somebody. One basis for a Section 1915(d) dismissal is the inability of a claimant to present facts which, if true, would be legally sufficient to justify relief. That is not the issue here. The issue here is whether, and if so how, a district court can determine that a claimant's factual allegations are so "fanciful" as to be frivolous to a degree justifying a Section 1915(d) dismissal.[6]

Petitioners would have this Court believe that the Ninth Circuit has "distorted" this Court's decision in Neitzke, has "evaded" uniform and simple rules of construction applicable to §1915(d), has been guilty of "hyperbole" in discussing the subject of credibility, and has virtually precluded district courts from exercising discretion in dealing with in forma pauperis litigants who meet the poverty qualification. None of this is true!

allegations is thus incorrect. Although that position might have been accurate if this Court were reviewing Hernandez I, the action of the Ninth Circuit panel, on remand, has broadened the permitted area of inquiry. For example, Section 1915(d) dismissals might well be appropriate where the prisoner's complaint facially demonstrates the existence of affirmative defenses rendering relief on it impossible, e.g. absolute immunity, res judicata, collateral estoppel, or the statute of limitations. Other matters that a district court might consider, in exercising its discretion, include whether the defendant is judgment-proof, whether identical claims have been litigated unsuccessfully by others, and whether alternative remedies exist for the facts pleaded.

[6] Petitioners spend significant effort in pointing to evidence tending to establish that Hernandez has mental problems, presumably in an attempt to equate an alleged delusionary status with delusionary allegations. As pointed out in Battle v. Central State Hospital, 898 F.2d 126, 130 (11th Cir. 1990), however, mental illness is not necessarily inconsistent with the ability to present a properly stated claim. Although a specific prisoner may be in need of medical or psychiatric treatment, his constitutional claims are nevertheless entitled to consideration on the same basis as similar claims by others.

In particular, petitioners seem to argue that Hernandez has admitted his own incompetency, by his assertion in Hernandez v. Ylst, 930 F.2d 714 (9th Cir. 1991), that his description of similar rapes in the San Luis Obispo County Jail, prior to his homicide trial, demonstrated his incompetency. To the contrary, however, the Ninth Circuit expressly found that Hernandez' relating of those events to his trial judge did not form a sufficient basis to require a competency hearing, much less a finding of incompetency.

The Sixth Circuit, in a case not involving significant analytical differences from Hernandez', has drawn an objective line which Hernandez believes to be appropriate, and which the Ninth Circuit has followed, albeit in different language. In Lawler v. Marshall, 898 F.2d 1196, 1199 (6th Cir. 1990), the Sixth Circuit opined that

> "The standard is not whether or not the district court believes the prisoner -- rather, it is whether the facts are rational. The defendants argue that because Lawler claims he saw the guards laughing in the reflection off his nail clipper, the claim is not rational. While Lawler's assertion strains credulity, it is not based on a delusional assertion of facts."

The Sixth Circuit referred, as examples of what it meant by delusional facts, to "prisoner petitions asserting that Robin Hood and his Merry Men deprived prisoners of their access to mail or that a genie granted a warden's wish to deny prisoners any access to legal texts." Ibid. But see White v. White, 886 F.2d 721, 721 (4th Cir. 1989) [a frivolousness finding need not require the court be faced with prisoner allegations that he is "appealing a criminal conviction returned on the planet Saturn"]. The Sixth Circuit's example is not materially different from that argued by Hernandez' counsel to the Ninth Circuit, and to this Court on petitioners' prior certiorari petition:

> "This is not a case where a prisoner is alleging that 'little green men from Mars' have taken over his mind by radio waves, and that prison authorities are responsible therefor! Allegations of that type would no doubt qualify for inclusion under the 'fantastic or delusional scenarios' language of Neitzke."

There is nothing "wholly fanciful," or "fantastic or delusional," however, about the propositions that drugs exist, or that homosexual activity occurs, or that inmate-guard relationships are less than amicable, in prison settings. Although the repetitive number of alleged rapes, Hernandez' claim that he was unaware of them

at the time they were occurring, and his claim that prison guards may have committed them and at least knowingly assisted them, are unusual, there is nothing in the inherent nature of those allegations that is inconsistent with judicially noticeable facts about the seamier side of prison life. Hernandez' allegations might (or might not) be uncredible; they are not, however, irrational.

Also contrary to petitioners' assertions, the above-referenced distinction between "rationality" and "credibility," expressly drawn by the Sixth Circuit and impliedly by the Ninth Circuit in the instant case, is a common and typical response of Courts of Appeals to this Court's decision in Nietzke. Although other circuits have not necessarily articulated the distinction with the clarity of the Sixth Circuit, the following post-Nietzke decisions demonstrate that the distinction has been generally recognized and accepted:

Fifth Circuit: Wesson v. Oglesby, 910 F.2d 278, 282 (5th Cir. 1990) ["inherently plausible and internally consistent"];[7]

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[7] Hernandez notes that the Fifth Circuit has adopted a procedure called a "Spears hearing," [Spears v. McCotter, 766 F.2d 179 (5th Cir. 1985)], in the nature of an evidentiary proceeding analogous to a motion for more definite statement under Rule 12(e), FRCP. The purpose of the hearing is (a) to assure that indigents have meaningful access to the federal courts, while at the same time (b) "winnow[ing] out the wheat from the unusual amount of chaff" involved in pro se litigation. Wilson v. Barrientos, 926 F.2d 480, 482 (5th Cir. 1991). Similarly, the Tenth Circuit employs a so-called "Martinez report" procedure [Martinez v. Aaron, 570 F.2d 317 (10th Cir. 1978)], which permits district courts to require the submission of administrative reports, and to use those reports in Section 1915(d) evaluations, "as a means of determining jurisdiction, sorting and clarifying issues and otherwise elucidating the often obscure complaints filed by pro se plaintiffs." El'Amin v. Pearce, 750 F.2d 829, 832 (10th Cir. 1984). No similar procedure exists in the Ninth Circuit.

In the instant case, we may not even have reached the point at which a Spears hearing would be appropriate, because the desirability of Hernandez filing an amended complaint or complaints, to clarify his position, has been alluded to by the concurring panel judge. The Fifth Circuit does permit district judges to make "limited credibility determinations" for Section 1915(d) dismissals (Wilson v. Barrientos, supra, 926 F.2d at 483), but only on the basis of "evidence . . . meet[ing] adequate indicia of reliability." Ibid. None of these procedural safeguards have been afforded to Hernandez.

Tenth Circuit: Williams v. Meese, 926 F.2d 994, 997 (10th Cir. 1991) ["plaintiff can prove no set of facts in support of his claim"] and

Eleventh Circuit: Battle v. Central State Hospital, 898 F.2d 126, 130 (11th Cir., 1990) ["some rational basis in fact"].[8]

III. The Procedural Posture of Hernandez' Actions at the Time of Dismissal.

The concurring judge of the Court of Appeals panel characterized Hernandez' allegations as "unlikely." A number of factors, however, exist in the record to support at least the possibility of another conclusion, including the following:

1. Hernandez had moved for document discovery of various of his prison medical records, supposedly in aid of being able to support his credibility by showing that he had in fact sought the medical attention which he alleged;[9]

2. Hernandez had filed affidavits from three other prisoners which purported to support his contentions that guards and other inmates had entered his cell at night; and

3. The Magistrate had opined that Hernandez' allegations, taken separately, were not frivolous, and that it was only their identical nature in multiple instances that rendered them frivolous.

---

[8] Candor requires the observation, however, that the Fifth and Eleventh Circuits have also articulated a standard which would appear to permit Section 1915(d) dismissals where a trial court finds, with regard to specified factual allegations, that the plaintiff's "realistic chances of ultimate success are slight." Wesson v. Oglesby, supra at 281; Clark v. State of Georgia Pardons and Paroles Board, 915 F.2d 636, 639 (11th Cir. 1990). Hernandez contends (a) that this standard appears to be internally inconsistent with the "rational/credible" distinction also observed by those courts, and (b) that at least in the Fifth Circuit a "Spears hearing" can adduce specific grounds for determining a lack of "realistic chances of success" which are not properly determinable from the face of the prisoner pleadings themselves.

[9] If Hernandez' claims can properly be dismissed as "fanciful," such a result will occur (a) in the face of the District Court's inability to make such a determination on the basis of the face of his individual pleadings alone, but (b) also in the face of the District Court's failure to allow him to attempt to secure objective evidence which might tend to support those claims.

These facts, and the posture of Hernandez' actions at the time of the Magistrate's dismissal recommendations[10], give rise to another question of significance in the interpretation of Section 1915(d): Is it appropriate for a district judge to dismiss an action under the authority of Section 1915(d) after the complaint has been served and the defendants have answered? The rule of the Third Circuit is "No." See Roman v. Ieffes, 904 F.2d 192 (3d Cir. 1990). Although this was not in issue before the Ninth Circuit, that is what happened here. If it is the purpose of Section 1915(d) to discourage the wasteful use of judicial resources, that concept would seem to mandate that Section 1915(d) dismissals occur prior to service of process. If a complaint is sufficiently colorable to survive an initial screening review upon filing, as was clearly the case here, it should be left to the parties to inform the Court as to the existence or non-existence of facts and/or legal theories justifying either a continuation or a dismissal of the action.

CONCLUSION

The Ninth Circuit Court of Appeals, consistent with a majority of the other circuits, has held that determinations of credibility are impermissible, at least without the taking of evidence, in making a decision as to whether an in forma pauperis complaint should be dismissed as frivolous, pursuant to 28 U.S.C. §1915(d). A distinction exists between determinations of rationality and determinations of credibility. The Ninth Circuit observed that contextual distinction, and found Hernandez' allegations not to be irrational. In doing so, the Ninth Circuit has acted

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10 Petitioners have alluded to a number of facts, e.g. denial of his habeas petition and dismissal of another Section 1983 complaint alleging that he was forced to eat food laced with heroin, which have arisen subsequent to the District Court's dismissal of the cases involved in the instant proceeding. Whatever consideration might appropriately be given to those facts by the District Court in the future, those facts were not before the District Court at the time it dismissed Hernandez' instant actions, and therefore are not properly a part of the record on the basis of which this Court should render its decision.

consistently with, and not at odds with, the majority of the courts which have interpreted Neitzke.

Moreover, the policy aim at which Section 1915(d) is directed, the avoidance of wasteful and unnecessary expenditure of judicial resources, is best served at the very inception of pro se litigation, before process has been served and the defendants have been compelled to answer.[11] Once the parties have come to issue, it is unseemly for the Court to interject itself, sua sponte, onto one side at the expense of the other. But that would be the effect of permitting Section 1915(d) dismissals after the filing of responsive pleadings.

Here, petitioners appear to be seeking a rule permitting the discretionary making of credibility determinations, without the protections of any evidentiary hearing, without the opportunity to amend to meet procedural pleading deficiencies, and long after the defendants have been served and some of them have filed responsive pleadings, in a context where the prisoner's allegations, while perhaps unlikely, are not inherently irrational. If it is still the law that prisoners in their pro se petitions are to be held "to less stringent standards than formal pleadings drafted by lawyers," (Haines v. Kerner, 404 U.S. 519, 520 [1972]), and that prisoners are entitled to "those rights not fundamentally inconsistent with imprisonment itself or incompatible with the objectives of incarceration," (Hudson v. Palmer, 468 U.S. 517, 523 [1984]), then petitioners' posture here would drastically impact those rules of law. There is no justification therefor. Petitioners' petition for

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11 Compare this Court's recent amendment to its Rule 39, by adding Rule 39.8 which provides for denial of in forma pauperis status if the Court is "satisfied" that a certiorari or other petition is "frivolous or malicious."

certiorari to the United States Court of Appeals for the Ninth Circuit should be denied.

DATED: June 27, 1991

Respectfully submitted,

Richard W. Nichols

Richard W. Nichols, Esq.
McDonough, Holland & Allen
A Professional Corporation
Attorney (Appointed by the
United States Court of Appeals)
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(1915 - 1987)

June 28, 1991

Clerk of the Court
United States Supreme Court
Washington, D.C. 20543

Re: Denton, et al. v. Hernandez, No. 90-1846

Dear Mr. Clerk:

Enclosed are the original and fifteen copies of Brief of Respondent in Opposition to Petition for Certiorari, pursuant to Supreme Court Rule 39.5. Also enclosed are the original and fifteen copies of the following documents, submitted pursuant to Supreme Court Rule 39.1:

1. Motion by Respondent Mike Hernandez for Leave to Proceed in Forma Pauperis;

2. Motion for Appointment of Counsel for Indigent Party; and

3. Consent of Attorney to Appointment as Counsel for Respondent.

Please return three endorsed copies of these documents to the undersigned.

No affidavit or declaration is submitted with these documents, because the undersigned was appointed as counsel for respondent by the United States Court of Appeals for the Ninth Circuit. That appointment, however, was a pro bono appointment and not under the Criminal Justice Act. Additionally, respondent was permitted to proceed in forma pauperis in that Court.

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Because of the language of Supreme Court Rule 39.1, it is unclear to counsel whether an affidavit or declaration is required.

Very truly yours,

Richard W. Nichols

Richard W. Nichols

RWN/p
Encls.

cc: James Ching, Supervising Deputy Attorney General
State of California

Supreme Court of the United States

No. 90-1846

George F. Denton, Director of Corrections of California, et al.,

Petitioners

v.

Mike Hernandez

ON CONSIDERATION of the motion of respondent for leave to proceed in forma pauperis,

IT IS ORDERED by this Court that the said motion, be, and the same is hereby, granted.

October 7, 1991

CASE TITLE: GEORGE F. DENTON, et al. v. MIKE HERNANDEZ

COURT/CASE NO: SUPREME COURT NO. 90-1846

PROOF OF SERVICE

I am employed in the County of Sacramento; my business address is 555 Capitol Mall, Suite 950, Sacramento, California. I am over the age of eighteen years and not a party to the foregoing action.

On July 2, 1991 , I served the within

AFFIDAVIT OF MIKE HERNANDEZ IN SUPPORT OF MOTONS FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND FOR APPOINTMENT OF COUNSEL

on all parties in said action by placing a true copy thereof enclosed in a sealed envelope, with postage thereon fully prepaid, in the United States post office mailbox at Sacramento, California, addressed as set forth below:

JAMES CHING, Supervising Deputy Attorney General
State of California
1515 K Street, Suite 511
Sacramento, California 95814

Mike Hernandez
C-49192, #3-A4-26
Folsom State Prison, P.O. Box "W"
Represa, California 95671

I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 2, 1991 , at Sacramento, California.

P. A. Le Doux

ORIGINAL

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SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

* * *

GEORGE F. DENTON, et al.

Petitioners,

v.

MIKE HERNANDEZ,

Respondent.

No. 90-1846

MOTION TO DISPENSE WITH JOINT APPENDIX

(Rule 26.7)

Pursuant to Rule 26.7 of the Supreme Court Rules, the parties to the above-entitled matter move this Court to dispense with the requirement that a joint appendix be printed and permit this matter to be heard on the original record, i.e. the entire record before the court below, including pleadings and evidence, and the proceedings in the courts below. 13 Moore's Federal Practice (2d ed. 1991) at ftn. 6, SC 26-5. The parties, through their counsel, have conferred prior to the making of this motion and petitioners are authorized to represent herein that counsel for respondent is in agreement with this motion.

The following constitutes good cause for the granting of this motion. Upon information and belief, all relevant orders and opinions are contained in the appendix to the petition for certiorari. Moreover, in light of this Court's instructions to counsel that

3M

no extensions of time will be granted for the filing of briefs, counsel infer that this Court desires a speedy resolution of this matter and dispensing with the printing of the joint appendix will expedite the resolution of the case. Cf. Erie-Lackawanna Ry. Co. v. U.S., 385 U.S. 914, 915 (1966). Finally, the question presented on certiorari to this Court is primarily a legal one involving the definition of a term of art, "fivolity", in 28 U.S.C. section 1915(d) and no complex factual issues are implicated in the resolution of the issue. Cf. Gladden Co. v. Zdanok, 370 U.S. 530, 534 (1962) at ftn. 7.

CONCLUSION

Petitioners respectfully request that the requirement for printing of the joint appendix be dispensed with for the reasons set forth above. Respondent has no objection to the granting of this motion.

Dated: November 22, 1991

Respecfully submitted,

DANIEL E. LUNGREN, Attorney General
of the State of California
GEORGE WILLIAMSON, Chief Assistant
Attorney General

JAMES CHING, Supervising
Deputy Attorney General
Counsel of Record

AFFIDAVIT OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss.
CITY AND COUNTY)
OF SACRAMENTO)

CYNTHIA BAIN, being first duly sworn on oath deposes and states:

I am 18 years of age or older and not a party to the within entitled cause; my business address is 1515 K Street, Suite 511, Sacramento, California 95814.

On November 22, 1991, I served the attached **Motion to Dispense with Joint Appendix** in Denton, et al. v. Mike Hernandez, No. 90-1846, by placing a true copy thereon fully prepaid, in the United States mail at Sacramento, California, addressed as follows:

RICHARD W. NICHOLS, ESQ.
McDONOUGH, HOLLAND & ALLEN
A Professional Corporation
555 Capitol Mall, Suite 950
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Cynthia Bain
AFFIANT

Supreme Court, U.S.
FILED
DEC 12 1992
OFFICE OF THE CLERK

No. 90-1846

In The

SUPREME COURT OF THE UNITED STATES

February Term, 1992

GEORGE F. DENTON, et al., Petitioners,

v.

MIKE HERNANDEZ, Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONERS' BRIEF ON THE MERITS

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QUESTION PRESENTED

Whether a Federal District Court may dismiss a complaint pursuant to 28 U.S. Code section 1915(d) if it finds the complaint wholly fanciful although that finding was not made on facts judicially noticeable under Rule 201 of the Federal Rules of Evidence.

LIST OF PARTIES

When respondent filed his actions, petitioner George F. Denton was director of the California Department of Corrections, Eddie Ylst was superintendent of the California Medical Facility, and petitioner Paul J. Morris was warden of Folsom State Prison. The remaining petitioners were employees of the California Department of Corrections.

Respondent Mike Hernandez was and continues to be a prisoner confined within the California Department of Corrections.

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Other Authorities

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No. 90-1846

In The

SUPREME COURT OF THE UNITED STATES

February Term, 1992

GEORGE F. DENTON, et al.,

Petitioners,

v.

MIKE HERNANDEZ,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONERS' BRIEF ON THE MERITS

OPINIONS BELOW

The opinion for the Court of Appeals for the Ninth Circuit is reported at 929 F.2d 1374 (9th Cir. 1991) and is reprinted in the appendix to the Petition for Certiorari. The order of amendment filed by the Ninth Circuit on

April 10, 1991 and reproduced in the appendix makes certain corrections in the language of the opinion and denies a sua sponte request by a judge of the Ninth Circuit for an en banc hearing. The opinion was first published as Hernandez v. Denton, 919 F.2d 573 (9th Cir. 1990) and that opinion was superseded by the corrected 1991 opinion. The corrected opinion is referred to hereinafter as "Hernandez II".

This matter has been presented to this Court previously on petition for certiorari based upon an earlier decision of the Ninth Circuit, Hernandez v. Denton, 861 F.2d 1421 (9th Cir. 1988), hereinafter "Hernandez I". This Court granted the petition and remanded the matter to the Ninth Circuit for further consideration in light of Neitzke v. Williams, 490 U.S. 319 (1989). Denton v. Hernandez, ___U.S.___, 110 S.Ct. 37 (1989). The instant opinion, Hernandez II, is the result of that remand.[1/]

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1. Further published opinions relating to Mr. Hernandez are Hernandez v. Ylst, 930 F.2d 714 (9th Cir. 1991) and Hernandez v. Whiting, 881 F.2d 768 (9th Cir. 1989). Other decisions without published opinions are Hernandez v. Whiting, No. 88-6743, 1991 U.S. App. LEXIS 3282 (9th Cir. Dec. 7, 1990); Hernandez v. Herndon, No. 89-55783, 1991 U.S. App. LEXIS 1886 (9th Cir. Feb. 4, 1991); Hernandez v. Ylst, No. 89-16386, 1990 U.S. App. LEXIS 16930 (9th Cir. Sept. 18, 1990); Hernandez v. Ylst, No. 88-15352, 1989 U.S. App. LEXIS 17719 (9th Cir. Nov. 21, 1989); Hernandez v. McCarthy, No. 88-15366, 1989 U.S. App. LEXIS 9110 (9th Cir. June 2, 1989); Hernandez v. Whiting, No. 85-6171 (9th Cir. Dec. 15, 1986); and Hernandez v. Denton, No. 84-2800 (9th Cir. Aug. 13, 1986).

JURISDICTION

The Ninth Circuit rendered its opinion and a timely petition for certiorari was filed on May 30, 1991. Certiorari was granted on November 4, 1991. Denton v. Hernandez, ___U.S.___, 1991 U.S. LEXIS 6468 (Nov. 4, 1991). This Court has jurisdiction to review the judgment by writ of certiorari pursuant to 28 U.S.C. section 1254(1).

STATUTE INVOLVED

The statute involved is subdivision (d) of 28 U.S.C. 1915, related to proceedings in forma pauperis. That section is as follows:

> The court may request an attorney to represent any such person unable to employ counsel and may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious.

STATEMENT OF THE CASE

Prior to 1986, respondent, a state prisoner proceeding pro se, had filed numerous civil rights complaints pursuant to 42 U.S.C. section 1983.[2/] Five

complaints were related upon order of the district court on February 1, 1985. On April 17, 1986, the magistrate of the United States District Court for the Eastern District of California filed findings and recommendations that these complaints be dismissed pursuant to 28 U.S.C. section 1915(d). On May 5, 1986, the district court entered judgment against respondent. Hernandez I, 861 F.2d at 1422. Respondent appealed the dismissal of three

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2. The following are the cases listed by respondent as his in his complaint in No. S-85-0084 RAR:

Case Nos.	Filed	Decision Rendered
S-83-0645 LKK	06/15/83	
S-83-0917 MLS	08/17/83	*Dismissed* 9/29/84
S-83-0989 RAR	08/31/83	
S-83-1348 LKK	11/08/83	
S-84-0098 EJG	01/20/84	
S-84-0808 LKK	06/22/84	*Dismissed* 7/16/84
S-84-1074 LKK	08/20/84	
S-84-1311 RAR	10/12/84	
S-84-1198 MLS	09/17/84	
S-84-1608 EJG	12/05/84	

There is a notation on a July 14, 1985 letter from respondent to the Ninth Circuit in the record in what appears to be a clerk's hand. The notation lists another case, No. S-84-1317 MLS. The cases dismissed by the district court in the instant case are: Nos. S-83-0645 LKK; S-83-1348 LKK; S-84-1074 LKK; S-84-1198 MLS; and S-85-0084 RAR. Of these cases, respondent appealed Nos. S-83-0645 LKK, S-83-1348 LKK, and S-85-0084 LKK.

of the five cases, and these three were at issue in the Hernandez opinions and are now before this Court.

The various allegations in these complaints are set out in some detail in the dissent to the Ninth Circuit's 1988 decision. Hernandez I, 861 F.2d at 1433-1438, see also 1422. The allegations pertinent to the issues before the Court are that respondent was raped about 28 times over a period of more than two years in two separate prisons without once being conscious of the assaults at the time that he was being raped. Respondent claimed that these assaults occurred at Folsom Prison and the California Medical Facility and were committed by both inmates and correctional officers. He had no personal recollection of any of the assaults but deduces that they occurred from his claimed discovery of fecal and semen stains on his T-shirts and perceived needle wounds on his arms and legs. Respondent had been diagnosed as requiring psychiatric treatment and has been a patient at the Atascadero State Hospital, a state mental institution. Hernandez I, 861 F.2d at 1436-1438; Hernandez II, 929 F.2d at 1377.[3/]

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3. The transcript of Mr. Hernandez's own version of assaults similar to those alleged in the instant case is contained in a published opinion issued on April 10, 1991, the same day that Hernandez II was issued in final form. Hernandez v. Ylst, 930 F.2d at 715 n.1, and 717 n.4. Mr. Hernandez, on habeas corpus after a state court criminal conviction, sought to have the conviction overturned because the trial court did not institute proceedings to determine his competency to stand trial.

Id. at 716. The Ninth Circuit ruled that there was no substantial doubt of competency. Id. at 718. Inter alia, Mr. Hernandez cited his trial court statement regarding in-custody rapes as proof of his own incompetency. Id. at 717 n.4.

The "undeniably weird" allegations in the Ylst matter, (id. at 717 n.4), involved Mr. Hernandez being given heroin-loaded Tylenol in January, 1982. In addition, respondent alleged that there were needle puncture wounds on his body. On February 3, March 4 or 5, and April 24, he found other needle marks on his body. In addition, he found evidence of sexual abuse on his clothing in the first week of March and on April 10. Respondent concluded that he had been drugged every time he had found needle marks, and that he had been raped every time he had been drugged.

It is not clear that the events related by Mr. Hernandez in Ylst are the same as those alleged in his numerous cases. See id. at n.1. Not all of the complaints are in the record, but the earliest of the complaints involved in the instant case, No. S-83-0645 LKK, involved an alleged rape on July 29, 1982, the first day respondent was incarcerated in Folsom Prison. Because Mr. Hernandez was sentenced on June 14, 1982 (id. at 716) and was incarcerated in county jails prior to his trial, the correctional officers involved in the Ylst opinion were probably not state correctional officers. All the petitioners in the instant case are state correctional personnel and therefore it appears that the Ninth Circuit's conclusion that the alleged perpetrators in Ylst were the defendants in the Denton litigation is incorrect. Hernandez v. Ylst, 930 F.2d at 715 n.1. Given that Hernandez v. Whiting, 881 F.2d at 769, involved allegations that deputy sheriffs

On November 23, 1988, the Ninth Circuit reversed the district court and held, among other things, that the district court could not dismiss the rape allegations under section 1915(d). Hernandez I, 861 F.2d at 1427. The court held that a court may find a complaint "wholly fanciful" and without substance in law or fact only if the facts alleged are impossible in light of a judicially noticeable fact. Because the court would not take judicial notice that the alleged rapes did not occur, it would not dismiss the cases as frivolous. Id. at 1426-1427. The majority again concluded that even under Neitzke, an informa pauperis complaint can be dismissed under section 1915(d) as fanciful only if judicially unenforceable facts establish that plaintiff's allegations are impossible.

This Court vacated the 1988 opinion and remanded the matter for further consideration in light of Neitzke. Denton v. Hernandez, __U.S.___, 110 S.Ct. 37 (1989). The Ninth Circuit issued a second opinion, Hernandez II, on November 21, 1990. The majority also found, and the dissent agreed, that he alleged no facts capable of establishing that any of the named defendants assaulted him and the complaints could be dismissed under Rule 12(b)(6) of the Federal Rules of Civil Procedure, but remanded the cases to the district court because it was "not yet apparent that [the] claims lack[ed] either legal or factual basis." Hernandez II, 929 F.2d at 1376-7.

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had drugged and beaten up respondent, and then locked him in an isolation cell for three days without clothing, water, or a mattress, it is not certain that the Ylst allegations refer to Whiting.

The Court of Appeals modified its opinion and denied en banc hearing on April 10, 1991.

SUMMARY OF ARGUMENT

The present decision, Hernandez II, incorrectly limits the power granted the district courts to dismiss a frivolous case under 28 U.S.C. section 1915(d), in that district courts within the Ninth Circuit must now base a section 1915(d) dismissal on facts subject to judicial notice under Rule 201 of the Federal Rules of Evidence. These facts must establish that a plaintiff's allegations are impossible. This is neither sound law nor consonant with this Court's 1989 remand of this case to the Ninth Circuit. Hernandez II does not comport with the intent of Congress in enacting section 1915(d) or the holdings in Neitzke and will adversely affect the ability of district courts to handle the growing problem of prisoner in propria litigation because, as a practical matter, it does not admit of any discretion in the District Court to dismiss a fantastic complaint as frivolous under section 1915(d).

ARGUMENT

THE NINTH CIRCUIT'S DECISION IN HERNANDEZ II IMPROPERLY LIMITS SECTION 1915(D) AND THIS COURT'S DECISION IN NEITZKE, CREATING AN ANOMALOUS RULE AMONG THE CIRCUITS WITH REGARD TO THE DEFINITION OF FRIVOLOUS LITIGATION

Neitzke dealt with an inmate civil rights action that was dismissed as frivolous under section 1915(d) only because it failed to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure. Neitzke v. Williams, 490 U.S. at 321. This Court issued certiorari to resolve a conflict among the circuits as to whether a complaint deficient under Rule 12(b)(6) is necessarily also frivolous under section 1915(d). Id. at 324 n.3. The Court, in a unanimous opinion by Justice Marshall, found that a complaint which fails to state a claim is not necessarily frivolous under section 1915(d). Id. at 331. This Court found two distinct lineages for the rules at issue. Rule 12(b)(6) requires a judgment against the plaintiff if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations. If a district judge simply does not believe the factual allegations, no dismissal is authorized under Rule 12(b)(6).

Section 1915(d), as construed in Neitzke, does empower a court to disbelieve factual allegations. The

Court of Appeals would limit this power to reliance on facts which are subject to judicial notice under Rule 201 of Federal Rules of Evidence, and which establish that the allegations are impossible.

The intent of Congress in enacting section 1915(d) was to discourage the filing of, and waste of judicial and defendant resources upon, baseless lawsuits that paying litigants do not initiate because of the costs of bring suit and the sanctions for vexatious litigation. See, O'Connell v. Mason, 132 Fed. 245, 247 (1st Cir. 1904).

> Section 1915(d) has a separate function, one which molds rather differently the power to dismiss which it confers . . . . [T]he statute accords judges not only the authority to dismiss a claim based on an indisputably meritless legal theory, but also the unusual power to pierce the veil of the complaint's factual allegations and dismiss those claims whose factual contentions are clearly baseless . . . . Examples of the latter class are claims describing fantastic or delusional scenarios, claims which federal district judges are all too familiar. [Emphasis added.]

Neitzke v. Williams, 490 U.S. at 328. If a complaint lacks an arguable basis in law, dismissal under either section 1915(d) or Rule 12(b)(6) is proper. If the complaint raises an arguable legal question, "dismissal on Rule 12(b)(6) grounds is appropriate, but dismissal on the basis of frivolousness is not." Id. at 328. "[F]rivolousness in the

section 1915(d) context refers to a more limited set of claims than does Rule 12(b)(6) . . . ." Id. at 329.

The Hernandez II opinion rejects the possibility that a dismissal for frivolity may be based on "law, human behavior, or permissible inferences" (Hernandez I, 861 F.2d at 1429) and arbitrarily and without authority adopts a standard more restrictive than that announced in Neitzke. In doing so, the Ninth Circuit failed to do what this Court ordered in 1989, i.e. to review Hernandez I in light of this Court's holdings in Neitzke. Instead, the Ninth Circuit issued an opinion which distorts Neitzke and evades the uniform and simple rules governing the interpretation of section 1915(d).[4/]

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4. With the exception of the Ninth Circuit's holdings in Hernandez I and Hernandez II, this Court was correct in stating there was general conformance to this Court's rulings among the circuits on this point. Neitzke v. Williams, 490 U.S. at 325. Although the various circuits' formulation of the frivolity test show some wording differences, all honor the principles outlined in Neitzke. In the case of those circuits which do not have a post-Neitzke decision on point, there is no indication of any intent to stray from Neitzke principles.

The District of Columbia Circuit has stated that "if a complaint has at least an arguable basis in law and fact -- if the complaint is viable -- it cannot be deemed frivolous." Brandon v. D.C. Board of Parole, 734 F.2d 56, 59 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1127. The First Circuit relies on a similar "facts and law" test. Castro v. U.S., 584 F.Supp. 252, 263 (D.P.R. 1984), *aff'd*. 775 F.2d 399 (1st Cir. 1985). In Nance v. Kelly, 912 F.2d 605, 606

(2d Cir. 1990), the Second Circuit held that dismissal is proper when the factual contentions are clearly baseless, such as those produced by delusion or fantasy, or where there is an indisputably meritless legal theory.

The Third Circuit utilizes a test phrased in terms of an indisputably meritless legal theory or clearly baseless factual allegations. Abdul-Akbar v. Wilson, 901 F.2d 329, 333 (3d Cir. 1990). The Fourth Circuit prohibits dismissal unless the plaintiff is not entitled to relief beyond a reasonable doubt under any arguable construction both in fact and law. Johnson v. Silvers, 742 F.2d 823, 824 (4th Cir. 1984). The Fifth Circuit states a dismissal is proper if the claim's realistic chance of ultimate success is slight or the claim has no arguable basis in law and fact. Vornado v. Collins, 920 F.2d 320, 321 (5th Cir. 1991).

The Sixth Circuit requires an arguable basis in law or rational factual assertions. Lawler v. Marshall, 898 F.2d 1196, 1198-1199 (6th Cir. 1990). The Seventh Circuit utilizes the rational argument test. Corgain v. Miller, 708 F.2d 1241, 1247 (7th Cir. 1983). The Eighth Circuit states that it must appear beyond doubt that plaintiff can prove no set of facts in support of his claim that would entitle him to relief. Smith v. Bacon, 699 F.2d 434, 436 (8th Cir. 1983).

The Ninth Circuit, with the exception of Hernandez I and Hernandez II, uses the arguable basis in law or fact test. Jackson v. Arizona, 885 F.2d 639, 640 (9th Cir. 1989). However, Jackson announced an anomalous de novo review standard on appeal.

The Tenth and Eleventh Circuits utiiize the arguable basis in fact or law test. Wiggins v. New Mexico State

On remand, the Ninth Circuit undertook the application of these Neitzke principles to the facts of the instant case. Hernandez II, 929 F.2d at 1376 states:

> The Supreme Court in Neitzke said that under section 1915 judges may dismiss as frivolous not only claims based on patently meritless legal arguments, but those premised on baseless factual allegations as well. This holding is fully consistent with the prior law of this circuit. See, [Franklin v. Murphy, 745 F.2d 1227 (9th Cir. 1984)]. The defendants now focus on the Supreme Court's statement in Neitzke that examples of baseless factual claims are "fantastic or delusional scenarios." 109 S.Ct. at 1833. The defendants ask us to hold that Hernandez['s] allegations of 28 rapes are "fantastic or delusional scenarios," and affirm the district court's dismissal.

However, Hernandez II, as well as Hernandez I before it, interprets Neitzke to state that a claim cannot qualify as patently[5/] "delusional" or "hallucinatory" unless it rests

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Supreme Court Clerk, 664 F.2d 812, 815 (10th Cir. 1981), *cert. denied*, 459 U.S. 840; Moreland v. Wharton, 899 F.2d 1168, 1170 (11th Cir. 1990).

5. How "patent" came to modify "delusional" or "hallucinatory" with regard to section 1915(d) is unclear. Neitzke makes reference to a "patently insubstantial complaint" being liable to dismissal under Rule 12(b)(6)

upon facts which the court knows could not have occurred. The Ninth Circuit concludes that these foundational facts must be amenable to judicial notice under Rule 201(b) of the Federal Rules of Evidence.[6] Unless such contrary or countervailing foundational facts are known or capable of determination by reference to accurate sources, no case may be dismissed under section 1915(d) and Neitzke. Hernandez II, 929 F.2d at 1376; Hernandez I, 861 F.2d at 1426.

Framed in this fashion, the conclusion in the instant case was foregone. Because the Ninth Circuit could not "conclude that the plaintiff's claims of rape are contrary to any facts that are 'generally known' [or] ascertain the truth of the [plaintiff's] allegations by looking to any

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and not section 1915(d). Neitzke v. Williams, 490 U.S. at 327 n.6.

6. The genesis of this requirement is not detailed in Hernandez I or Hernandez II. Earlier Ninth Circuit cases permitted judicial notice but none required it. Conway v. Oliver, 429 F.2d 1307 (9th Cir. 1970); Williams v. Field, 394 F.2d 329 (9th Cir. 1968), *cert. denied*, 393 U.S. 891. Hernandez II does soften the holding of Hernandez I by making judicial notice "one useful standard" in the frivolity decision. However, Hernandez II is consistent with Hernandez I in reversing the dismissals because no judicial notice of contrary facts could be made. Hernandez II, 929 F.2d at 1376.

readily available, accurate source,"[7] the Court held that the district court had erred in dismissing the rape claims. Hernandez II, 929 F.2d 1374. Further, the Ninth Circuit rejected the concept that the aggregate of 28 rapes amounted to frivolity and stated (id. at 1376):

> If we were to affirm the district court's dismissal of all the claims as factually frivolous . . . , we would have to hold that all 28 rapes were delusions and that none of them occurred. While it is hard to believe that so many similar incidents actually happened, we cannot say that

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7. The Ninth Circuit's own opinion, issued on the same day as the instant opinion and involving the same Mr. Hernandez (Hernandez v. Ylst, 930 F.2d 714), should have been susceptible of judicial notice in this case. That case involved Mr. Hernandez's assertion that his prior statement regarding in-custody rape was proof of his own incompetency. Id. This would seem to be a significant fact, readily determinable from an unimpeachable source, that could be taken into account when deciding whether "all 28 rapes" alleged in the Hernandez II complaint were delusional. Although Hernandez v. Ylst refers to the "amaranthine" Hernandez II suit, Hernandez II does not refer to the Ylst case. Moreover, there is no reasonable explanation why the Ninth Circuit's unpublished 1990 opinion involving Mr. Hernandez, Hernandez v. Whiting, No. 88-6743, would not also have provided some cognizable facts under the Hernandez II judicial notice rule. In Hernandez v. Whiting, the Ninth Circuit found frivolous Mr. Hernandez's contention that he was forced to eat food loaded with heroin.

> none of them occurred without making the kinds of credibility determinations that are impermissible in deciding whether a claim is baseless under section 1915.[8/]

A considered examination of Neitzke reveals the Ninth Circuit's misinterpretation of that case. There is no authorization in Neitzke for the creation of a judicial notice rule for determining frivolity. Moreover, there is no hint that a wholly objective standard had to be used to determine frivolity. What is implicit in Neitzke is that district courts are permitted to exercise their discretion in determining when factual pleadings manifest "fantastic or delusional scenarios." Id. at 328.

The Hernandez II court would not dismiss the case unless an objective source could be found that positively established that Mr. Hernandez's 28 rapes could not have occurred. Indeed, no positive, objective fact could be found in other cases to counter fantastic allegations, such as that the plaintiff was the prophet Muhammed (Collins v. Henman, 676 F.Supp. 175, 176 (S.D. Ill. 1987)), or in communication with the Devil. U.S. ex rel. Mayo v. Satan

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8. This passage is somewhat opaque. Assuming that the opinion does not hold that an allegation of 28 rapes is 28 times more credible than an allegation of one, it appears that Ninth Circuit is stating that just because an absurd number of incidents are alleged, there is no means of determining that a minimum of one rape did not occur. This position eschews common sense and the experience of the district court bench.

and his Staff, 54 F.R.D. 282, 283 (W.D. Pa. 1971). The grafting of a judicial notice requirement upon Neitzke, de facto requires the district courts to render judgment on the merits of the case in a manner analogous to granting summary judgment, in that objective matter outside the record reference must be made to Rule 56(c) of the Federal Rules of Civil Procedure.

The discretion accorded to our trial courts in the light of human experience should be sufficient to disregard allegations so "hard to believe." Under the guise of reconciliation with Neitzke, the Ninth Circuit has eviscerated the clear holding of Neitzke and created its own idiosyncratic interpretation of section 1915(d).[9/]

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9. This holding is clearly grounded upon the Ninth Circuit's interpretation of section 1915(d), and the relief accorded respondent was reversal of the district court's dismissal of the claims. Hernandez II, 929 F.2d at 1377. In addition, there is dicta which indicates that respondent's claims failed to state a claim under Rule 12(b)(6) but "were not patently without legal substance." Id. at 1376. Moreover, the dissent states that the net effect of the reversal would be a remand for respondent to file an amended complaint. Id. at 1377 (Aldisert, J., dissenting). This implies that the Ninth Circuit understood that the complaints as they stood were not sustainable under Rule 12(b)(6). The Ninth Circuit observed, therefore, in a manner consistent with Neitzke, that a complaint may be deficient under Rule 12(b)(6), but not frivolous under section 1915(d). Neitzke v. Williams, 490 U.S. at 328-329.

Requiring the use of judicial notice means that district courts cannot utilize their discretion in this area and that a wealth of judicial experience cannot be brought to bear on any given complaint. The district courts should not have to cite scripture that certain allegations pass the bounds of rationality in order to find a complaint frivolous. Judgments should be made on experience. There is no mandate in Neitzke directing cumbersome and absurd mental gymnastics. Neitzke instead allows for the exercise of discretion by the district courts with regard to "fantastic or delusional scenarios, claims with which federal district judges are all too familiar." [Emphasis added]. Neitzke v. Williams, 490 U.S. at 328.

The situation in our trial courts is too grave to prohibit the exercise of considered discretion by district court judges. Justice Aldisert, in his Hernandez I dissent, stated the problem succinctly. The number of prisoner civil rights cases increased 1600 percent during the 20-year period ending in 1987[10/], and the number of these cases which were meritorious was very small, both proportionately and absolutely. Hernandez I, 861 F.2d at 1431 (Aldisert, J., dissenting) The existence of abusive

10. Some documentation of the proliferation of in propria persona litigation appears in Van Vort, *Note: Controlling and Deterring Frivolous In Forma Pauperis Complaints*, 55 Fordham L. Rev. 1165 (1987); Feldman, *Indigents in the Federal Courts*, 54 Fordham L. Rev. 413 (1985); and Turner, *When Prisoners Sue*, 92 Har. L. Rev. 610 (1979).

litigants[11/] poses a danger to the functioning of any system of justice. As Judge Aldrich wrote in 1904 in O'Connell v. Mason, 132 Fed. at 247:

> It is quite clear that Congress, while intending to extend to poor and meritorious suitors the privilege of having their wrongs redressed without the ordinary burdens of litigation, at

11. A veritable honor roll of truly vexatious litigants may be formed after the briefest review of the annotations. Green v. McKaskle, 788 F.2d 1116 (5th Cir. 1986); Procup v. Strickland, 792 F.2d 1069 (11th Cir. 1986); In re Martin-Trigona, 737 F.2d 1254 (2d Cir. 1984); In re Green, 669 F.2d 779 (D.C. Cir. 1981); Pavilonis v. King, 626 F.2d 1073 (1st Cir. 1980) *cert. denied*, 449 U.S. 829; Gordon v. U.S. Department of Justice, 558 F.2d 618 (9th Cir. 1977); Adams v. American Bar Assn., 400 F.Supp. 219 (E.D.Pa. 1975); Rudnicki v. McCormack, 210 F.Supp. 905 (D.R.I. 1962).

In addition, this Court has had occasion to deal with litigants of this stripe: Zatko v. California, ___U.S. ___, 1991 U.S. LEXIS 6501 (Nov. 4, 1991); In re Sindram, ___ U.S.___, 111 S.Ct. 896 (1991); In re McDonald, ___ U.S. ___, 109 S.Ct. 993 (1989).

This Court's plenary power to adjust its own procedures in the interests of justice was manifested in In re Amendment to Rule 39, ___U.S.___, 111 S.Ct. 1572 (1991). See, Brockton Savings Bank v. Peat, Marwick, Mitchell & Co., 771 F.2d 5, 11 (1st Cir. 1985) *cert. denied*, 475 U.S. 1018; O'Connell v. Mason, 132 Fed. at 245.

> the same time intended to safeguard members of the public against an abuse of the privilege by evil-minded persons who might avail themselves of the shield of immunity from costs for the purpose of harassing those with whom they were not in accord, by subjecting them to vexatious and frivolous legal proceedings.

The interplay between these opposing goals is dealt with in Neitzke v. Williams, 490 U.S. at 326:

> We recognize the problems in judicial administration caused by the surfeit of meritless in forma pauperis complaints in the federal courts, not the least of which is the possibility that meritorious complaints will receive inadequate attention or be difficult to identify amidst the overwhelming number of meritless complaints.

This Court in Neitzke reiterated and approved the test announced in Anders v. California, 386 U.S. 738, 744 (1967). A district court must determine whether the complaint lacks an arguable basis in fact or law. This Court felt no need to elaborate further[12/] on this test and

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12. In addition to the nearly uniform definition of frivolity among the circuits (see ftn. 4, supra), the meaning of "frivolous" is plain and consistent "both in common and legal parlance". Neitzke, 490 U.S. at 329. Indeed, the first definition given in Webster's is "of little

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weight or importance: having no basis in law or fact." Webster's Third New International Dictionary (1961); Hernandez I at 1430.

The "frivolous" language appeared in the original version of the statute. 27 Stat. 252, ch. 209 (1892). Examination of contemporary Supreme Court cases yields a number of inferable synonyms for "frivolous" which are at one with that approved in Neitzke. E.g. Cornell v. Green, 163 U.S. 75, 80 (1896) ["wholly destitute of foundation"]; Nash v. Harshman, 149 U.S. 263, 264 (1893) ["wholly groundless"]; Metropolitan Nat. Bank v. Claggett, 141 U.S. 520, 525 (1891) ["easy of concession or refutation"]; Ex Parte Wall, 107 U.S. 265, 285 (1882) ["slight"]; Bates v. Clark, 95 U.S. 204, 205 (1877) ["sham"].

Another use of "frivolous" appears in federal jurisprudence. Bell v. Hood, 327 U.S. 678, 682 (1946) held that the actual validity of the claim asserted is irrelevant to the issue of whether the matter in controversy arises under the laws of the United States within the meaning of 28 U.S.C. section 1331(a). In that case the plaintiff had sought damages for alleged violations of the Fourth and Fifth Amendment by FBI agents. The trial court dismissed because it found that damages were not expressly authorized for such constitutional violations. This Court held that such a complaint, having been framed in terms of federal law, was within federal jurisdiction unless the claim was immaterial and made solely for the purpose of obtaining jurisdiction or where the claim was wholly insubstantial and frivolous. In a manner reminiscent of Neitzke, the Court differentiated between the fundamental jurisdictional question and whether a cause of action was stated for which the trial court could grant relief.

proceeded to hold that a complaint filed in forma pauperis is not automatically frivolous because it fails to state a claim. Neitzke v. Williams, 490 U.S. at 1834.

Hernandez II, by engrafting an exclusive judicial notice test upon Neitzke, eschews the simplicity of the Anders test as all other circuits have interpreted it, and ensures that no cases with outlandish factual allegations can ever be dismissed for frivolity.[13/] Rather than allowing a district court to "pierce the veil of the complaint's factual allegations," the Ninth Circuit has

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Chief Justice Rehnquist has criticized Bell as "one of the most cryptic in the recent history of this Court's jurisprudence" because of its lack of clarity regarding the screening process to be employed by trial courts. Yazoo County Industrial Development Corp. v. Suthoff, 457 U.S. 1157, 102 S.Ct. 1032, 1033 (1982) (Rehnquist, C.J., dissenting). This concern about the "differences among the Federal Courts of Appeals in deciding whether the federal question in a complaint is 'wholly insubstantial and frivolous' within the meaning of Bell" (id. at 1034) is the same as should be raised by the instant case.

13. The Ninth Circuit has in fact allowed exceptions to its own harsh rule, but, it appears, only in unpublished cases. Hernandez v. Whiting, No. 88-6743, another of Mr. Hernandez's cases, involved the alleged forced feeding of heroin-laced food. The Ninth Circuit found the Whiting case frivolous. Similarly, the Ninth Circuit found frivolous allegations that the government had made an inmate the experimental subject of gassing experiments. Morris v. FBI, No. 90-55813, 1991 U.S. App. LEXIS 1296 (9th Cir. Jan. 23, 1991).

removed all discretion with regard to frivolity based on factual allegations and has created conflict among the circuits as to a statute vitally important for the administration of the trial courts. This anomalous opinion should be reversed.

CONCLUSION

Contrary to the plain meaning of Neitzke, the decision in Hernandez II places unwarranted restrictions upon the discretion of the district courts in dismissing actions under section 1915(d). Hernandez II does not conform to the spirit or letter of this Court's 1989 remand order, and the opinion must be reversed in order to ensure that this Court's mandates are obeyed in a uniform manner by all the circuits.

DATED: December 10, 1991

Respectfully submitted,

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AFFIDAVIT OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss.
CITY AND COUNTY)
OF SACRAMENTO)

CYNTHIA BAIN, being first duly sworn on oath deposes and states:

I am 18 years of age or older and not a party to the within entitled cause; my business address is 1515 K Street, Suite 511, Sacramento, California 95814.

On December 12, 1991, I served the attached **Petitioner's Brief on the Merits** in said cause, by placing three true copies thereon fully prepaid, in the United States mail at Sacramento, California, addressed as follows:

RICHARD W. NICHOLS, ESQ.
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Cynthia Bain
AFFIANT

Subscribed and sworn to before me this 12th day of December 1991.

Rosalind Lender
Notary Public in and for said County and State

ROSALIND LENDER
NOTARY PUBLIC-CALIFORNIA
COUNTY OF SACRAMENTO
My Commission Expires March 14, 1995

FILED
JAN 17 1992
OFFICE OF THE CLERK

No. 90-1846

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

GEORGE F. DENTON, Director of Corrections of California, *et al.*,

Petitioners,

v.

MIKE HERNANDEZ,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF RESPONDENT ON THE MERITS

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QUESTION PRESENTED

Petitioners, in their petition for certiorari, framed the "question presented" as follows:

> "Whether a Federal District Court may dismiss a complaint pursuant to 28 U.S. Code section 1915(d) if it finds the complaint wholly fanciful despite the fact that reliance was not made on judicially noticeable facts, i.e. facts of [sic] which are generally known or ascertainable by reference to a readily available, accurate source."

In their brief on the merits, petitioners have slightly modified their articulation of the question presented, which now reads as follows:

> "Whether a Federal Court may dismiss a complaint pursuant to 28 U. S. Code section 1915(d) if it finds the complaint wholly fanciful although that finding was not made on facts judicially noticeable under Rule 201 of the Federal Rules of Evidence."

The Solicitor General on behalf of the United States, as Amicus Curiae supporting petitioners, has framed the question presented as being

> "Whether an action is factually frivolous, and therefore subject to dismissal under 28 U.S.C. 1915(d), only if the factual allegations in the complaint are refutable by judicial notice."

Respondent believes that a more appropriate statement of the question presented should be as follows:

> "Whether any objective standard should be followed by a United States District Court in determining whether the factual allegations in a complaint filed *in forma pauperis* pursuant to 28 U.S.C. § 1915(a) are 'fanciful' or 'baseless,' and therefore 'frivolous,' within the meaning of 28 U.S.C. § 1915(d), and, if so, what that standard should be."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 90-1846

GEORGE F. DENTON, Director of Corrections of California, *et al.*,

Petitioners,

v.

MIKE HERNANDEZ,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF RESPONDENT ON THE MERITS

OPINIONS BELOW

The original opinion of Ninth Circuit in *Hernandez* v. *Denton* (*"Hernandez I"*) appears at 861 F.2d 1421 (9th Cir. 1988). On a previous petition for certiorari (No. 88-2034), this Court vacated the Ninth Circuit's decision and remanded this case to that Court for further consideration in light of *Neitzke* v. *Williams*, 490 U.S. 319 (1989). *Denton* v. *Hernandez*, 493 U.S. 801 (1989).

The initial opinion of the Ninth Circuit after remand from this Court, *Hernandez* v. *Denton*, appears at 919

F.2d 573 (9th Cir. 1990). No party petitioned for rehearing, but a Judge of that Court, *sua sponte*, requested that the Court consider the matter *en banc*. Ultimately, that Court decided not to review the matter *en banc*, but the panel slightly modified its initial opinion on remand. The modified opinion as amended on denial of rehearing, *Hernandez* v. *Denton* ("*Hernandez II*"), appears at 929 F.2d 1374 (9th Cir. 1991).

JURISDICTION

This Court has jurisdiction over this proceeding pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

28 U.S.C. § 1915(d): "*The court* may request an attorney to represent any such person unable to employ counsel and *may dismiss the case* if the allegation of poverty is untrue, or *if satisfied that the action is frivolous or malicious.*" (Emphasis added.)

STATEMENT OF THE CASE

This proceeding involves three separate actions filed in the United States District Court for the Eastern District of California under 42 U.S.C. § 1983. The three actions were consolidated on appeal by the United States Court of Appeals for the Ninth Circuit and are before this Court on that same consolidated basis.

1. The First Complaint.

On June 15, 1983, respondent Mike Hernandez ("Hernandez"), a state prisoner, filed a complaint, No. Civ. S-83-645, against various officials and employees of the California Department of Corrections. He named as defendants the Director of the California Department of Corrections, George F. Denton ("Denton"), the Warden of the California State Prison at Folsom, Paul J. Morris ("Morris"), and various John Does who were identified

as either prison guards or inmate classification committee members.

By Order filed September 21, 1983, the District Court permitted him to proceed with No. Civ. S-83-645 *in forma pauperis*, pursuant to 28 U.S.C. § 1915(a). The District Court also inquired into the question of whether the action was frivolous or malicious, within the meaning of 28 U.S.C. § 1915(d). Its Order stated that the Court "cannot determine from the present record whether or not plaintiff's claim is frivolous." Finally, the Order directed Hernandez to use the discovery processes of the Federal Rules of Civil Procedure ("FRCP") in order to obtain document discovery.

In February 1984, Hernandez served a motion for leave to amend his complaint, to add four additional named defendants: Lieutenant Gonzalez, a member of the Folsom Prison classification committee; Lieutenant Rutherford, a member of the Folsom Prison disciplinary committee; one Tomasetti, a civilian employee of the Department of Corrections assigned to the Folsom Prison disciplinary committee; and a Sergeant Lee, a custodial guard at Folsom Prison.

On April 2, 1984, the District Court granted Denton's motion to dismiss under FRCP Rule 12(b)(6), with leave to amend. On June 20, no new amendment having been filed, the District Court dismissed the action, and judgment was entered on June 21. On June 28, Hernandez filed a motion to vacate the judgment of dismissal and to file an amended complaint, substantially renewing his previous amended complaint allegations and alleging mail delays in connection with the filing of his amended complaint. On June 29, the District Court vacated its June 21 judgment of dismissal and reexamined the issue of frivolousness under 28 U.S.C. § 1915(d). Once again, the District Court stated that it "cannot determine from the present record whether or not plaintiff's claim is frivolous."

Hernandez then filed the amended complaint that is one of the subjects of this proceeding. He alleged therein that he had been sexually assaulted by prison guards during the night of July 29-30, 1982, his first night at Folsom Prison. He alleged that the following day he heard guards and inmates taunting and ridiculing him about that incident. He also alleged that, on August 5, during an interview by the Initial Classification Committee for purposes of assignment to housing, custody level and work program, he complained of the incident and presented evidence in support of his complaint. He alleged that no institutional administrative action was taken in response to that complaint. He also alleged that he had been deprived of various procedural due process rights and subjected to various unrelated Eighth Amendment violations.[1]

Denton, Morris, Gonzalez and Tomasetti each filed answers to Hernandez' amended complaint; the summonses directed to Rutherford and Lee were returned unexecuted. Hernandez then initiated discovery on October 4, 1984, by requesting the production of various documents. The defendants responded by asserting that they would permit him to inspect the documents, but would not copy them for him without provision for payment. Some documents were produced, but Hernandez claimed that certain medical records were withheld, and that he was not given an opportunity to make the required copying arrangements.

Hernandez moved to compel production. He admitted that the defendants, as they asserted, had allowed him to examine and make copies of documents contained in his "central file," but he contended that his medical records were not contained in that "central file" and were thus not made available to him. The Court's file does not disclose any counter-declaration to establish that the medical

[1] The Court of Appeals affirmed the District Court's dismissal of Hernandez' complaints as to those procedural due process allegations, and they are not before this Court in this proceeding.

records were in fact contained in the "central file." This discovery dispute was never resolved, because of the Magistrate's *sua sponte* dismissal recommendation and the District Court's order and judgment of dismissal, discussed in Section 5 of this Statement of the Case, *infra*.

2. The Second Complaint.

Hernandez filed another Section 1983 complaint, No. Civ. S-83-1348, on November 8, 1983. Named as defendants were Denton, the Superintendent of the California Medical Facility ("CMF") at Vacaville, Eddie Ylst ("Ylst"), Correctional Lieutenant Hartman ("Hartman"), Correctional Sergeant Anderson ("Anderson"), and Correctional Officer Ingle.

On November 14, 1983, the District Court granted *forma pauperis* status to Hernandez, stating that it could not "determine from the present record whether or not plaintiff's claim is frivolous." All defendants other than Anderson filed answers to Hernandez' complaint on February 17, 1984.

Hernandez thereafter submitted various motions for leave to amend and supplement his complaint, which were either dropped from the calendar or not acted upon because of various procedural notice deficiencies in connection with their filing and/or service. In a proposed amended complaint dated June 19, 1984, Hernandez presented allegations that he had been assaulted and raped by inmates during the night of July 29-30, 1983, the first night after he had been moved by Anderson from Cell L-361, Unit IV of L-3 Wing, to a Third Floor Dorm located in the N-2 Wing at Vacaville. He alleged that he became aware of this incident by finding needle marks, concerning which he made complaint; he also alleged that, on August 6, he was again moved out of the Dorm into a single cell, N-233.

Hernandez accompanied this amended complaint with a sworn declaration from another inmate, one Harold

Pierce. Pierce's declaration asserted that "on the night of July 29, 1983, I witnessed inmate Dushane B-71187 and inmate Milliard B-30802 assault and rape inmate Mike Hernandez as he layed [sic] asleep in Bed 206 in the N-2 Unit Dorm."

Hernandez requested document production similar to his requests in No. Civ. S-83-645, received similar responses thereto, and filed a similar motion to compel, which, because of the Magistrate's dismissal recommendation and the District Court's subsequent order and judgment of dismissal, was never acted upon.

3. Two Intervening Complaints.[2]

On August 20, 1984, Hernandez filed a complaint (No. Civ. S-84-1074), naming as defendants Ylst, Correctional Sergeant Tilton, and Correctional Officers Kohler, Kidwell, King, Blanton, Glover and Arambula. This complaint involved six additional alleged drugging and homosexual rapes occurring between August 12 and November 4, 1983. Hernandez was housed, at that time, in the N Wing, 2d Floor, and at least the first of these incidents allegedly occurred during the First Watch.

On September 17, 1984, Hernandez filed another complaint (No. Civ. S-84-1198) involving three additional alleged incidents, naming as defendants Ylst, Hartman, Correctional Sergeant Ryan, and Correctional Officers

[2] Petitioners have referenced, in addition to the two complaints described in this portion of Hernandez' brief, District Court Civil Nos. S-83-917, S-83-989, S-84-98, S-84-808, S-84-1311 and S-84-1317, all on the basis of Hernandez' reference to those cases in his "third" complaint, No. S-85-84 described hereinafter. There is no indication in the record as to the content of those cases, and, more to the point, those cases were *not considered by the Magistrate* when he made his findings and recommendations for dismissal. The Magistrate made his recommendation expressly, and solely, on the basis of "a reading of all five complaints together." This reference was to the three cases which are the subject of this proceeding plus the two cases which are described herein as the "intervening complaints."

Espinosa, Huddleston, Bowers and Belyea, all of whom were alleged to have been on duty at the Willis (Segregation) Unit of CMF during the 11:00 p.m. to 7:00 a.m. (Second) Watch. Hernandez alleged that Hartman had ordered him into administrative segregation for five days on November 26, 1983, that he was placed in Cell W-116 (a multiple occupant cell), that on November 27 he awoke to discover needle tracks and bruises and other wounds indicative of possible drugging and homosexual rape, that he complained about this to the authorities and was moved to a single cell in the same unit on November 29, that he was released to the general population (Cell P-263) on December 2, that he made complaints and asked for names on December 3 and was immediately given a "rules violation notice" and reordered to administrative segregation, that on December 4 he again awoke to discover needle tracks and other symptoms of homosexual rape, and that a similar sequence of events happened on December 12.

4. The Third Complaint.[3]

Hernandez filed a complaint (No. Civ. S-85-84) on January 21, 1985, alleging that fifteen additional similar incidents involving drugging and sexual assault at CMF had occurred between January 12 and December 10, 1984. Named as defendants were Ylst, Correctional Lieutenant McFadden, and Correctional Officers Smith, McIntyre, Perdoni, Fitzgerald, Price and Tomlinson.[4] As independ-

[3] As indicated in footnote 2, this is actually the fifth complaint filed by Hernandez which the Magistrate considered, but Hernandez did not appeal the District Court's dismissals of the two intervening complaints. It appears that the reason for Hernandez' decision to appeal only the three cases before this Court was that, in these three cases, he had obtained and filed sworn declarations from other inmates which tended to support some of his allegations.

[4] Hernandez alleged the following rapes:

a. During the night of January 12-13, 1984, in Cell P-256, by McIntyre and two inmates, in an incident witnessed by

ent evidence in support of his allegations concerning some of those incidents, Hernandez attached to his complaint copies of two sworn declarations from two other inmates.

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another inmate, one Armando Esquer, whose affidavit to that effect was attached as an exhibit to Hernandez' complaint;

b. During the night of January 26-27, 1884, also by McIntyre and two inmates, and also observed by inmate Esquer and described in his affidavit;

c. During the night of March 22-23, 1984, by unknown persons but believed to be Perdoni, based on finding needle marks on his right wrist on the morning of March 23;

d. During the night of June 28-29, 1984, by unknown persons but believed to be Perdoni, based on finding needle marks on his left arm, right wrist and right ankle on the morning of June 29;

e. On August 4 and August 23, 1984, believed to be by Perdoni, based on needle marks discovery;

f. On September 11, 1984, by Fitzgerald and Price, based on discovery of a needle mark on his left thumb, that mark having been observed by another inmate, one Peter John Goodridge, according to Goodridge's sworn declaration attached as an exhibit to Hernandez' complaint;

g. On September 16, 1984, by Price, based on discovery of needle marks on his left arm and right wrist, that mark also having been observed by inmate Goodridge;

h. On September 21, 1984, shortly before 7:00 a.m., by Perdoni and/or McIntyre, based on awakening feeling ill and nauseous and discovering needle marks on his abdomen, those marks and that condition having been observed by inmate Goodridge;

i. During the night of September 26-27, 1984, by McIntyre, based on awakening to discover needle marks on his left arm and abdomen;

j. On October 8, 1984, by McIntyre, based on awakening to discover a needle mark on his right arm;

k. During the night of October 26-27 or 27-28, 1984, by McIntyre, based on awakening to discover needle marks on his left arm and abdomen;

l. During the night of November 22-23 or 23-24, 1984, by McIntyre, based on awakening to discover three needle marks on his left wrist;

In a declaration dated May 30, 1984, attached as Exhibit H to Hernandez' complaint, inmate Armando Esquer made the following sworn assertions:

> "On January 13, 1984, at approximately 7:30 a.m., I was on my way to the shower, when I saw correctional officer McIntyre, the P-2 Unit Officer, unlock inmate Mike Hernandez's cell door and subsequently saw as two black inmates stepped inside his cell. I did not see Officer McIntyre order these two black inmates out of inmate Mike Hernandez's cell after they stepped inside, even though inmate Mike Hernandez was asleep inside. After about ten minutes, I returned from the shower, and I noticed my friend, Mike Hernandez, was being sexually assaulted by the two black inmates. Officer McIntyre returned to lock inmate Mike Hernandez's cell door after the two black inmates stepped out. I watch [sic] all this activity from the hallway and my cell door.
>
> "On January 27th, 1984, I was again on my way to the shower, when I noticed the same correctional officer as he unlocked inmate Mike Hernandez's cell door, and also saw as two black inmates stepped inside inmate Mike Hernandez's cell. Then I knew right away that both they and Officer McIntyre were up to no good. After this last incident, I became convinced that Officer McIntyre was deliberately unlocking my friend, Mike Hernandez's cell as he laid [sic] asleep, so that these two black inmates could sexually assault him in his cell."

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m. During the early morning hours of December 5, 1984, by Tomlinson, based on awakening to discover needle marks on his left arm;

n. During the early morning hours of December 9, 1984, by McIntyre, based on awakening to discover needle marks on his left wrist and right leg; and

o. During the early morning hours of December 10, 1984, by McIntyre, based on awakening to discover a needle mark on his right arm.

And in a declaration dated November 15, 1984, attached as Exhibit K to Hernandez' complaint, inmate Peter Jon Goodridge made the following sworn assertions:

> "On or about September 10, 1984, the plaintiff showed me point-scratch marks on his left thumb. . . . On or about September 16, 1984, the plaintiff showed me more point-scratch marks on his left arm. . . . On or about September 21, 1984, the plaintiff showed me numerous point-scratches on his abdomen, below his naval. He had been dizzy and semi-conscious the morning of Friday, the 21st day of September 1984, before he left the living room in P-2 Wing, to go out to the prison yard. Plaintiff's speech was impaired and broken and his eyes were not fully open as normal."

Inmate Goodridge then went on to identify the correctional officers who had been on duty in the P-2 wing on those dates.

Hernandez also alleged a number of procedural due process violations, supported in part by sworn declarations of inmates Alexander Cuevas and Carlos Ruelas. The Court of Appeals affirmed the District Court's dismissal of those allegations, and those allegations are not before this Court. See footnote 1, *supra*.

5. Consolidation and Dismissal of the Lawsuits.

On February 1, 1985, the District Court entered a "Related Case Order" pursuant to E.D. Cal. Local Rule 123, relating each of the five cases and assigning them to District Judge Lawrence K. Karlton. As indicated, Hernandez had commenced discovery activities, directed in part toward securing his medical records. On April 17, 1986, however, while Hernandez' motions to compel production of his prison medical file were pending,[5] the

[5] Hernandez had sought various documents from his prison medical file, in an effort to obtain evidence which he contended would have supported his factual allegations concerning the assaults which are the subject of this proceeding.

United States Magistrate, *sua sponte*, filed Findings and Recommendations, recommending that *forma pauperis* status in all of the related cases be granted pursuant to 28 U.S.C. § 1915(a), but also recommending that all five related actions be dismissed as frivolous, pursuant to 28 U.S.C. § 1915(d). The basis for the recommendation is set forth, in its entirety, in the following paragraph of the Magistrate's Order:

> "The court has concluded that the present five actions lack arguable substance in law or fact and should therefore be dismissed. Although each complaint, taken separately, is not necessarily frivolous, a different picture emerges from a reading of all five complaints together. Plaintiff alleges that both guards and inmates, at different institutions, subjected him to sexual assaults. Despite the fact that different defendants are allegedly responsible for each assault, the purported *modus operandi* is identical in every case. Moreover, the attacks occurred only sporadically throughout a three year period. The facts thus appear to be 'wholly fanciful' and justify this court's dismisal of the actions as frivolous."

The Magistrate declined to address Hernandez' motions to compel production of his medical records, finding the motions to be moot in light of the recommendation for dismissal.

On May 2, 1986, Hernandez filed written objections to the Magistrate's recommendation. He asserted that he had presented affirmative independent evidence in support of his complaints, and appended three of the previously filed affidavits from three different inmates in support thereof. On May 5, 1986, however, the District Court issued an order adopting the Magistrate's recommendation and entered judgments of dismissal as to all five cases. Hernandez filed notices of appeal as to the three cases in which he had filed the supporting affidavits from other prisoners.

6. The Appellate Process.

The United States Court of Appeals for the Ninth Circuit reversed the dismissals in part and remanded the cases to the District Court. *Hernandez I, supra*, 861 F.2d 1421 (9th Cir. 1988). Three separate opinions were authored by the panel. The lead opinion affirmed the dismissals on the procedural due process claims, but reversed the dismissals on the drugging and homosexual rape claims, because those dismissals had been "based upon credibility determinations impermissible under section 1915(d)." *Hernandez I, supra*, 861 F.2d at 1427. The holding of the lead opinion was to the effect that "[o]nly if the facts alleged are impossible in light of any judicially noticeable fact may the district court find a complaint 'wholly fanciful' and hence without arguable substance in law or fact." *Id.* at 1426.

Judge Wallace, concurring in the judgment, noted that Hernandez had never been given an opportunity to amend his complaints to avoid various legal deficiencies appearing therein, and that the settled law of the Ninth Circuit was that a *pro se* complaint could not be dismissed without notifying the plaintiff of those deficiencies and allowing leave to amend in light of that notice. He then opined, for that reason, that the dismissals should be vacated to allow Hernandez to amend in light of notice of specific deficiencies. *Id.* at 1427.

The California Attorney General, representing the defendant prison officials and employees, filed a petition for certiorari. Subsequent to *Hernandez I*, this Court rendered its decision in *Neitzke* v. *Williams*, 490 U.S. 319 (1989) ("*Neitzke*"). Accordingly, this Court granted certiorari, vacated the Ninth Circuit's disposition, and remanded the matter of further consideration in light of *Neitzke*. *Denton* v. *Hernandez*, 493 U.S. 801 (1989).

On remand, each of the members of the Ninth Circuit's panel concluded that this Court's decision in *Neitzke* supported, or at least did not cause a change in, his or her previously-expressed views, and that Court reaffirmed its previous disposition in *Hernandez I*. *Hernandez* v. *Denton, supra*, 919 F.2d 573 (9th Cir. 1990). The lead opinion concluded that

> "Under *Neitzke*, we do not believe that a claim can qualify as patently 'delusional' or 'hallucinatory' unless it rests upon facts which the court knows could not have occurred." *Hernandez* v. *Denton, supra*, 919 F.2d at 575, modified in other respects on denial of rehearing *en banc* in *Hernandez II, supra*, 929 F.2d at 1376.

A lengthy dissenting opinion in *Hernandez I*, commencing at page 1427 of 861 F.2d, had set forth the view that Hernandez' various complaints represented nothing more than "the hallucinations of a troubled man"[6] (861 F.2d at 1440), and that no amendment could cure that problem. On remand, the dissenting judge reaffirmed that view, and opined that his position "has been endorsed sub silentio by the [Supreme] court in its remand to us." *Hernandez* v. *Denton, supra*, 919 F.2d at 576, modified on denial of rehearing *en banc* in *Hernandez II, supra*, 929 F.2d at 1377.

After the Ninth Circuit as a whole rejected a *sua sponte* suggestion of one of its members for an *en banc* rehearing, the author of the lead opinion further modified that opinion by striking its prior specific direction that Hernandez amend his claims "to provide more specific factual recitations of the time and place of each of the rapes and conduct on the part of prison officials which violated constitutional standards." The modified opinion, *Hernandez II*, appears at 929 F.2d 1374 (9th Cir. 1990). The Cali-

[6] Although the dissent made several references to Hernandez' place of incarceration as the Atascadero State Hospital, in fact Hernandez is presently incarcerated at Folsom State Prison, and has been for several years. When the instant complaints were filed, he was incarcerated at CMF Vacaville.

fornia Attorney General, on behalf of the defendant prison officials and employees, again petitioned for certiorari, which, on November 4, 1991, this Court granted. The Solicitor General of the United States has filed a brief as amicus curiae supporting petitioners.

SUMMARY OF ARGUMENT

Complaints filed *in forma pauperis* are subject to dismissal as factually "frivolous," pursuant to 28 U.S.C. § 1915(d), only when the factual allegations lack any "arguable basis." District courts, in making such determinations, should be guided by objective standards, and should not be permitted either (a) to make credibility determinations or (b) to engage in weighing the likelihood of success of a paricular complaint. A standard that would preclude Section 1915(d) dismissals unless the allegations are either (a) irrational, or (b) disprovable by objective facts of which judicial notice can be taken, is the appropriate objective standard. Respondent Hernandez' allegations do not permit dismissal under this standard.

Because the statutory term "frivolous" appears in a statute of general applicability rather than one dealing exclusively with prisoner civil rights actions, policy considerations supporting access to the courts call for a narrow construction of the term. The goal of assisting overburdened district courts in controlling their dockets can be advanced by alternative means, implementing Section 1915(d), such as imposing heightened pleading standards in *in forma pauperis* cases, requiring issues-identification procedures and perhaps exhaustion of administrative remedies in prisoner civil rights cases, early use of summary judgment motions, and imposition of vexatious litigant controls.

Although Section 1915(d) and Rule 11, FRCP, address similar goals, they do so by procedures which are so dissimilar as to make inappropriate the application of Rule

11 standards to Section 1915(d) determinations. Moreover, considerations of judicial efficiency as a whole counsel the creation of full and complete records for appellate review of dismissals of complaints.

The deciding vote for the Court of Appeals' reversal of the dismissals of Hernandez' cases was based on the District Court's procedural non-compliance with established Ninth Circuit law requiring that *pro se* plaintiffs be advised of the deficiencies in their pleadings, and given opportunity to remedy those deficiencies. Accordingly, whatever the appropriate standard of review for Section 1915(d) dismissals should be abstractly, that standard should not be applied to Hernandez' cases.

ARGUMENT

I. AN ACTION IS "FRIVOLOUS" ONLY WHEN IT "LACKS AN ARGUABLE BASIS EITHER IN FACT OR IN LAW.

This Court, in *Neitzke*, established the rule to be followed by District Courts in determining whether a complaint should be dismissed as "frivolous" under 28 U.S.C. § 1915(d). It noted that the courts of appeals had generally, and "correctly," adopted close variants of the definition of frivolousness set forth for appeal purposes in *Anders* v. *California*, 386 U.S. 738, 744 (1967) ("[not] arguable on their merits"). *Neitzke*, *supra* at 325. It extended the definition to complaints, involving both factual allegations and legal conclusions, by concluding that a complaint "is frivolous where it lacks an arguable basis either in law or in fact." *Ibid.* It concluded that the term "frivolous" "embraces . . . the fanciful factual allegation." *Ibid.* The *Neitzke* standard, as thus articulated, virtually tracked the standard which had previously existed in the Ninth Circuit under *Franklin* v. *Murphy*, 745 F.2d 1221, 1227-1228 (9th Cir. 1984), a standard which the Ninth Circuit had expressly applied in *Hernandez I*, and which it again applied under the authority of *Nietzke* in *Hernandez II*.

Neitzke reaffirmed this Court's commitment to "Congress' overarching goal in enacting the *in forma pauperis* statute: 'to assure equality of consideration for all litigants.'" *Neitzke*, *supra* at 329, citing *Coppedge* v. *United States*, 369 U.S. 438, 447 (1962). It referred, as examples of the types of unarguable claims which could properly be dismissed as frivolous, to those "describing fantastic or delusional scenarios," and noted that District Court were "all too familiar" with such types of claims. *Neitzke*, *supra* at 328. As hereinafter indicated, Hernandez views this language as merely articulating, in different words, the proposition that complaints postulating *irrational* scenarios may be dismissed as frivolous.[7]

Neitzke clearly establishes that Rule 12(b)(6) dismissals differ in kind from Section 1915(d) dismissals, and that a given complaint may be insufficient under Rule 12(b)(6) and yet not be frivolous within the meaning of Section 1915(d). The present case is the converse of that equation: can a complaint be deemed to be factually frivolous if it *does* pass muster under Rule 12(b)(6)? Hernandez asserts that, unless the facts alleged are either irrational or otherwise objectively disprovable by judicially noticeable facts, it cannot.

[7] Some circuits articulated a "realistic chance of ultimate success on the merits" standard prior to *Neitzke*, and have continued to refer to that standard after *Neitzke*. Hernandez believes that the "realistic chance of success" standard is incompatible with the "arguable basis in fact" standard which *Neitzke* prescribes. Other circuits have rejected the "realistic chance of success" standard. See, e.g., *Malone* v. *Colyer*, 710 F.2d 258, 261 (6th Cir. 1983), and *Boyce* v. *Alizaduh*, 595 F.2d 948, 952 (4th Cir. 1979).

II. DISTRICT COURTS SHOULD FOLLOW OBJECTIVE STANDARDS IN DETERMINING THAT A PARTICULAR CASE LACKS AN "ARGUABLE BASIS IN FACT."

This proceeding requires the Court to consider the question whether any objective standard must be followed by District Courts in determining claims to be lacking of an "arguable basis" in fact, and if so, what that standard is.[8] This Court has already counseled against "a restrictive interpretation of [the *in forma pauperis*] statute". *Adkins* v. *E. I. DuPont De Nemours & Co.*, 335 U.S. 331, 340 (1948). Section 1915 is a remedial statute and thus should be liberally construed. Cf. *Peyton* v. *Rowe*, 391 U.S. 54, 65 (1968). Hernandez submits that an objective standard is required; indeed, this Court has previously held that, for appeal purposes under the *forma pauperis* statute, the "good faith" requirement for district court certification of an appeal "must be judged by an objective standard." *Coppedge*, *supra* at 445. Hernandez perceives no reason to distinguish, in requiring an objective standard, between trial court "good faith" determinations for appeal purposes and trial court "frivolousness" determinations for trial court purposes.

"Adequate, effective and meaningful" access to the courts is a fundamental right founded upon the due process clause of the Fifth and Fourteenth Amendments. *Bounds* v. *Smith*, 430 U.S. 817, 822-823 (1977). That right "assures that no person will be denied the opportunity to present to the judiciary allegations concerning

[8] Contrary to petitioners' apparent view that district courts should have complete discretion under Section 1915(d), the United States as amicus curiae and Hernandez appear to agree on the desirability of applying an objective standard to district court action under the statute; the United States and Hernandez differ only on the question of what that objective standard should be.

violations of fundamental constitutional rights." *Wolff* v. *McDonnell*, 418 U.S. 539, 579 (1974). Access to the court is not "adequate, effective and meaningful" if complaints can be dismissed as factually frivolous, simply because the facts presented are highly unlikely. If judgments of dismissal are permissible under Section 1915(d) on the basis of credibility determinations made in the absence of evidentiary hearings, poor people[9] will have been placed into a position whereby their right of access to the courts is significantly different from that right of access available to paying plaintiffs.

III. ONE SUCH OBJECTIVE STANDARD INVOLVES A DISTINCTION BETWEEN FACTUAL ALLEGATIONS THAT ARE IRRATIONAL VS. FACTUAL ALLEGATIONS THAT ARE MERELY UNLIKELY OR UNCREDIBLE.

While admitting that "no single word or group of words provide a precise formula that will dispose of every case," *Coppedge* v. *United States*, *supra* at 441, Hernandez believes that this Court has already adopted a "rational-credible" distinction with regard to the *forma pauperis* statute, by holding that a pauper appellant is entitled to be heard "if he makes a *rational* argument on the law or facts." (Emphasis added.) *Coppedge*, *supra* at 448.

Consistent with this view, in situations involving the filing of complaints *in forma pauperis*, the Sixth Circuit has articulated an objective standard (rational vs. credible) which Hernandez believes to be appropriate in determining whether a factual claim has an "arguable basis." The Ninth Circuit followed that standard in *Hernandez I* and *Hernandez II*, albeit in different language. In *Lawler* v. *Marshall*, 898 F.2d 1196, 1199 (6th Cir. 1990), a post-*Neitzke* case not involving significant

[9] The quesion presented to this Court is not limited to the context of prisoner civil rights litigation. See Section IV-A of this brief, *infra*.

analytical differences from Hernandez' case, the Sixth Circuit opined that

> "The standard is not whether or not the district court believes the prisoner—rather, it is whether the facts are rational. The defendants argue that because Lawler claims he saw the guards laughing in the reflection off his nail clipper, the claim is not rational. While Lawler's assertion strains credulity, it is not based on a delusional assertion of facts."

The Sixth Circuit referred, as examples of what it meant by delusional facts, to "prisoner petitions asserting that Robin Hood and his Merry Men deprived prisoners of their access to mail or that a genie granted a warden's wish to deny prisoners any access to legal texts." *Ibid.*[10] The Sixth Circuit's example is not materially different from that argued by Hernandez to the Ninth Circuit, and to this Court on petitioners' prior certiorari petition:

> "This is not a case where a prisoner is alleging that 'little green men from Mars' have taken over his mind by radio waves, and that prison authorities are responsible therefor! Allegations of that type would no doubt qualify for inclusion under the 'fantastic or delusional scenarios' language of *Neitzke*."

The Ninth Circuit's imposition of a "judicial notice" standard as one basis[11] for judging the frivolousness of

[10] But see *White* v. *White*, 886 F.2d 721, 724 (4th Cir. 1989) (a frivolousness finding need not require that the court be faced with prisoner allegations that he is "appealing a criminal conviction returned on the planet Saturn").

[11] Both petitioners and the United States as amicus curiae take the Court of Appeals to task for failing to discuss *other* bases for determining factual frivolousness. As one example, however, *forma pauperis* complaints might be dismissed for factual frivolousness where a set of alleged facts has been previously and unsuccessfully asserted in litigation by a party involved in a specific event but not in privity with a subsequent *forma pauperis* plaintiff suing on the same event, thus precluding application of *res judicata* or collateral estoppel concepts.

forma pauperis factual allegations is merely another way of semantically articulating the "rational vs. credible" distinction argued here by Hernandez. Rule 201(b) of the Federal Rules of Evidence permits judicial notice of facts which are "not subject to reasonable dispute." It specifies that the absence of a "reasonable dispute" as to a particular fact is to be determined on the basis that

> "it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."

Assertions of facts that are "irrational" fall within the negative scope of this definition; assertions of facts that are merely "unlikely" or "uncredible" do not.[12] This distinction is perfectly consistent with petitioners' references to district court dismissals of allegations that a plaintiff was the prophet Muhammed, or that another plaintiff was in communication with the Devil. Petitioners' Brief on the Merits ["petitioners' brief"], pages 16-17.

Contrary to petitioners' assertion (petitioners' brief, pages 11-13, footnote 4), the Ninth Circuit's judicial notice standard, which effectively distinguishes between irrational and merely unlikely or uncredible allegations, is not out of step with the standards applied by other circuits. Although many cases simply parrot the "arguable basis" standard and do not meet the question of what constitutes an "arguable basis in fact," some circuits have addressed the problem.

For example, in *Battle* v. *Central State Hospital*, 898 F.2d 126 (11th Cir. 1990), the Eleventh Circuit concluded that this Court's affirmance of the Seventh Circuit's decision in *Neitzke* constituted the adoption of "a more restrictive standard in the area of permissible § 1915(d) dismissals." *Id.* at 128. That Court concluded that, while Battle's filings gave evidence of mental illness,[13] the trial court's Section 1915(d) dismissal must be reversed because the claim "appear[ed] to have some *rational* basis in fact and consequently . . . [was] not clearly baseless."[14] *Id.* at 130. (Emphasis added.)

In this regard, the *Battle* Court also noted that this Court's *Neitzke* affirmance was of a Seventh Circuit opinion which articulated a "no *rational* argument in law or facts" standard. *Williams* v. *Faulkner*, 837 F.2d 304, 306 (7th Cir. 1988), affirmed sub. nom. *Neitzke* v. *Williams*, *supra*. The Seventh Circuit's balancing of interests between preserving meaningful access to the courts and eliminating non-meritorious lawsuits resulted in a standard permits Section 1915(d) dismissals "only if the petitioner can make no *rational* argument in law or facts." *Jones* v. *Morris*, 777 F.2d 1277, 1279-1280 (7th Cir. 1985).[15] (Emphasis added.)

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[12] A court can take judicial notice that alleged facts that are irrational did not occur, whereas it cannot take judicial notice that alleged facts that are merely uncredible or unlikely did not actually occur.

[13] A standard which would permit Section 1915(d) dismissals based on credibility determinations would seem to preclude mentally ill prisoners or patients as a class from brining actions *in forma pauperis*, because by definition the credibility of such persons is suspect. It is for this reason that consideration should be given to the rationality of the allegations themselves and not simply to the rationality of the person bringing them.

[14] The Court appears to have been opining that a standard articulated in *Harris* v. *Menendez*, 817 F.2d 737, 740-741 (11th Cir. 1987) ["realistic chances of ultimate success are slight"], to support Section 1915(d) dismissals was no longer good law after *Neitzke*. Statistically, *all* prisoner cases can be said to have "realistically slight" chances of success.

[15] See also *Dase* v. *Solem*, 858 F.2d 385, 387 (8th Cir. 1988) [no dismissal where prisoner sets forth "a legally and factually *rational* argument" (emphasis added)]. And, as indicated, in a post-*Neitzke* decision the Sixth Circuit has expressly adopted the "rational vs.

III. APPLICATION OF THE "ARGUABLE BASIS" STANDARD TO HERNANDEZ' ALLEGATIONS.

The following facts in the record in this proceeding [16] are important in determining whether the Section 1915(d) statutory term "frivolous" should be applied to bar Hernandez' particular complaints:

1. At least some of Hernandez' factual allegations, against the guards who unlocked his cell door and either committed the alleged rapes or permitted them to occur by admitting other persons into his cell for that purpose, either were or could be amended to be sufficient to state claims against those persons sufficient to withstand a Rule 12(b)(6) dismissal;

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credible" distinction. *Lawler* v. *Marshall*, *supra*, 898 F.2d 1196, 1199 (6th Cir. 1990).

[16] Petitioners have pointed to the existence of a significant number of matters which either were not in the files of the District Court at all at the time Hernandez' complaints were dismissed, or were not considered by the Magistrate and the District Court in dismissing those complaints or by the Court of Appeals in vacating that dismissal. It would be inappropriate for this Court, in establishing an appropriate standard on the basis of which district courts can dismiss cases under Section 1915(d), to review the propriety of the dismissals of these cases on the basis of matters never presented to the District Court or the Court of Appeals. See *Boag* v. *MacDougall*, 454 U.S. 364, 365 n.* (1982). Specifically:

a. Neither the District Court nor the Court of Appeals considered the matter described in footnote 1 of petitioners' brief. And at least two of the cases cited in footnote 1 involved appeals in which Hernandez *prevailed* in the Ninth Circuit.

b. Although the matters described in footnote 2 of petitioners' brief were referenced in Hernandez' "third" complaint, neither the Magistrate nor the District Court considered them in dismissing the instant complaints.

c. The matter described in footnotes 3 and 7 of petitioners' brief was not considered either by the District Court or by the Court of Appeals. Moreover, the Ninth Circuit found, in *Hernandez* v. *Ylst*, 930 F.2d 714 (9th Cir. 1991), that the description by Hernandez to his original trial judge of similar rapes in the San Luis Obispo County Jail was *not* sufficiently irrational to require a competency hearing, much less a finding of incompetency.

2. Hernandez was never given notice of those of his factual allegations against other defendants which were legally or factually insufficient to withstand a Rule 12(b)(6) motion, and the reasons therefor, so that he could attempt to amend to cure those deficiencies, in accordance with previously existing Ninth Circuit practice and as suggested by the concurring judge below; [17]

3. Hernandez presented independent support from other inmates for some of his factual allegations, including in one instance a specific identification of activities of a particular guard, and in another instance specific identification of inmates assaulting Hernandez in a prison dorm, and in yet another instance corroboration of the existence of marks on Hernandez' body and of Hernandez' demeanor consistent with Hernandez' allegations of having been drugged;

4. Hernandez, in most instances, specifically identified the guards on shift duty in the particular prison wing or area at the particular time of the alleged assaults;

5. In two of the three cases before this Court, the defendants had filed answers to Hernandez' complaints, and document discovery proceedings had been initiated,[18]

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[17] *Pro se* prisoner complaints are judged by more lenient standards than are formal pleadings prepared by lawyers. *Haines* v. *Kerner*, 404 U.S. 519, 520 (1972).

[18] If Hernandez' claims can properly be dismissed as "fanciful," such a result would occur (a) in the face of the District Court's inability to make such a determination on the basis of the face of his individual pleadings alone, but (b) also in the face of the District Court's failure to allow him to attempt to secure objective evidence which might tend to further support those claims. Moreover, this factor is relevant to the argument of the United States that a Rule 11-type "duty of inquiry" is required of *forma pauperis* plaintiffs. See Section IV-C of this brief, *infra*. The record here discloses that Hernandez in fact (a) did obtain affidavits from other inmates supporting, in part, his allegations, and (b) did attempt unsuccessfully to obtain records from his medical file to support those allegations. Given that the Rule 11 "duty of inquiry" requires

thus bringing the adversary system into play; [19]

6. No judicial officer at any level has ever determined, after an evidentiary hearing, that Hernandez' allegations are factually untrue; [20] and

7. Hernandez' factual alegations are not inherently impossible, and therefore are not irrational.

There is nothing "wholly fanciful," or "fantastic or delusional," about the propositions that drugs exist, or that homosexual activity occurs, or that inmate-guard relationships are less than amicable, in prison settings. Prisons house the strong and the weak; the weak are subject to being preyed upon by the strong, and there is nothing inherently illogical about the proposition that forced homosexual activity occurs on an on-going basis.[21]

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only what is "reasonable" under the circumstances, the instant record does not evidence a failure of Hernandez in that regard.

[19] It is the rule of some circuits that Section 1915(d) dismissals are not appropriate after a complaint has been served and the defendants have answered. See, e.g., *Roman* v. *Jeffes*, 904 F.2d 192, 195-196 (3d Cir. 1990), and *Williams* v. *White*, 897 F.2d 942, 943-944 (8th Cir. 1990).

[20] For this reason, this Court's construction of its own Rule 39.8, involving denial of leave to proceed with certiorari petitions *in forma pauperis*, should not control this case. Questions involving review of cases where at least two judicial determinations (one district court and one court of appeals) on the merits have been made are qualitatively different from questions involving cases where no judicial officer has ever addressed the merits of the case.

[21] The Magistrate and the dissenting Court of Appeals judge, while reaching a common conclusion, appear to have viewed this subject from different perspectives. The Magistrate apparently discounted Hernandez' allegations because "the attacks occurred only sporadically throughout a three year period." The dissenting Court of Appeals judge, however, gave great emphasis to the number of alleged attacks in concluding that Hernandez' allegations were "sheer and utter nonsense" and therefore went "beyond the pale of

Although allegations that that type of activity was perpetrated by, or with the knowing asisstance of, prison guards are unusual, the history of correctional institutions precludes one from fairly concluding that such activity could *never* occur.

IV. POLICY CONSIDERATIONS.

At least five policy considerations weigh in favor of a narrow definition of the statutory term "frivolous" within the meaning of Section 1915(d). First, the clear Congressional purpose of the statute was to allow indigents to use the courts. Second, common sense and reality dictate that the courts must be sensitive to the great potential for abuses in the prisons. Third, most *forma pauperis* plaintiffs lack experience and skill in legal pleading, and therefore often present awkward and confusing complaints. Fourth, *some* claims are in fact meritorious, but might be prematurely dismissed under an overly broad exercise of Section 1915(d) discretion.[22] Fifth, a narrow definition would obviate disparity of treatment based upon economic circumstances.

A number of policy arguments have been advanced in favor of granting to district courts broader discretion to

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frivolity." *Hernandez I*, *supra* at 1438; and cf. *Hernandez II*, *supra* at 1378.

Petitioners assert that the Court of Appeals concluded either (a) that an allegation of many rapes is more credible than an allegation of just one, or (b) that just because "an absurd number of incidents are alleged," there is no means of determining that at least *one* of those incidents did not occur. Petitioners argue that "[t]his position eschews common sense and . . . experience . . . ." Petitioners' brief, footnote 8. To the contrary, however, there is nothing nonsensical about the proposition that if a guard felt sufficiently safe to engage in the alleged activity at all, he would feel sufficiently safe to engage in it on an ongoing basis.

[22] "Even the most dedicated trial judges are bound to overlook meritorious cases without the benefit of an adversarial presentation." *Bounds* v. *Smith*, *supra*, 430 U.S. 817, 826 (1977).

issue Section 1915(d) dismissals than would be permitted under the Ninth Circuit's standard articulated in these cases. This Court in *Neitzke*, *supra*, at 326, however, warned that its "role in appraising petitiners' reading of § 1915(d) is not to make policy, but to interpret a statute." Moreover, while some of those policy arguments are not without merit, it would be premature to apply them to the instant case. And in other instances, the arguments are outweighed by countervailing considerations.

A. Statutory Construction Considerations.

The facts of this particular matter involve allegations by a state prisoner. The question presented to this Court, however, is not limited to prisoner civil rights litigation. To the contrary, it involves the construction of a statute of general applicability to poor persons. A holding that would permit district courts to dismiss cases based on an evaluation either of the credibility of the plaintiff or of the plaintiff's reasonable chances of success would permit dismissals, without evidentiary or procedural protections, of such matters as securities fraud complaints brought by investors defrauded of their life's savings, RICO complaints by small businessmen put out of business by sharp practices of others, consumer litigation involving defective products, complaints involving improper administrative activities by governmental agencies, etc. Although the judicial system faces admitted burdens and problems from the filing of thousands of meritless prisoner civil rights actions, the Court should not attempt to fashion a remedy for *those* burdens and problems in a manner which would adversely impact the ability of poor persons in general to claim entitlement to judicial relief for wrongs allegedly done to them.

B. Pleading and Procedure Remedies.

The increasing number of prisoner civil rights actions is an admitted burden on the judicial system; that is not

a subject for debate.[23] Hernandez submits, however, that the solution to that burden is not to establish a rule of general application which would deny poor persons access to the system *in the first instance*. The courts have several remedies which are appropriate to address those cases in which the likelihood of success is small. This Court has authorized district courts to exercise their inherent authority, notwithstanding the absence of statutory or rule authority therefor, to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Link* v. *Wabash R. Co.*, 370 U.S. 626 (1962) (dismissal of case for lack of prosecution); and *cf. Chambers* v. *NASCO, Inc.*, —— U.S. ——, 111 S.Ct. —, 115 L.Ed.2d 27, 44 (1991). Resort to procedures short of dismissals of cases based solely on disbelief of unlikely allegations should be first attempted.

1. *Fact Pleading.*

Some of the circuits have adopted a "heightened pleading standard," peculiar to civil rights actions, which requires plaintiffs to allege specific facts in support of their complaints where subjective motivation or intent is an element of the claim.[24] This Court, however, has never articulated such a rule, which would seemingly contradict the plain language of Rules 8(a)(2) and 9(b), FRCP.

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[23] The reason or reasons for that increase, on the other hand, can be a subject of substantial disagreement. It is a fact, however, that prison population has greatly increased over the last few years, and it appears that that trend is likely to continue. More prisoners mean more prisoner litigation.

[24] The Ninth Circuit had not expressly adopted such a standard until its decision in *Branch* v. *Tunnell*, 937 F.2d 1382, 1386 (9th Cir. 1991), after its decisions in both *Hernandez I* and *Hernandez II*. Indeed, the modification of the lead opinion in *Hernandez II* on denial of *en banc* consideration, deleting language which would have directed Hernandez to amend his complaints on remand, may reasonably be viewed as an effort to avoid prejudging the issue in a case where that issue was directly involved.

Although such a question was before this Court in *Siegert* v. *Gilley*, —— U.S. ——, 111 S.Ct. 1789, 114 L.Ed.2d 277 (1991), this Court declined to reach the question. A heightened pleading standard established by this Court, applied to *forma pauperis* complaints as a method of implementing Section 1915(d), would be an appropriate step addressing the balance between maintenance of the constitutional right of access to the courts and the practical problems of burdensome but ultimately unproductive complaints by indigents.[25] *This is the practical result of the Ninth Circuit's decision.* The second vote for reversal of the District Court, that of concurring Judge Wallace, was expressly based on the proposition that Hernandez should be permitted to amend to articulate specific facts as to specific defendants of specific unconstitutional activity, i.e., an amendment under a heightened pleading standard.

2. *Issues-Identification Requirements.*

Some circuits have adopted procedural requirements to assist them in appropriately dealing with prisoner civil rights complaints. The Fifth Circuit has adopted a procedure called a "Spears hearing," [*Spears* v. *McCotter*, 766 F.2d 179 (5th Cir. 1985)], in the nature of an evidentiary proceeding analogous to a motion for a more definite statement under Rule 12(e), FRCP. The purpose of the hearing is (a) to assure that indigents have meaningful access to the federal courts, while at the same time (b) "winnow[ing] out the wheat from the unusual amount of chaff" involved in *pro se* litigation. *Wilson* v. *Barrientos*, 926 F.2d 480, 482 (5th Cir. 1991). Similarly,

[25] While the greatest effects of a heightened pleading would be likely to be experienced in the area of prisoner litigation, the imposition of such a requirement as a method of enabling district courts to "satisfy" themselves concerning lack of factual frivolousness should logically extend to all *forma pauperis* complaints. This does not seem too great an imposition to require of plaintiffs who are seeking the benefits of the Government's fisc.

the Tenth Circuit employs a so-called "Martinez report" procedure [*Martinez* v. *Aaron*, 570 F.2d 317 (10th Cir. 1978)], which permits district courts to require the submission of administrative reports, and to use those reports in Section 1915(d) evaluations, "as a means of determining jurisdiction, sorting and clarifying issues and otherwise elucidating the often obscure complaints filed by *pro se* plaintiffs." *El'Amin* v. *Pearce*, 750 F.2d 829, 832 (10th Cir. 1984). The Ninth Circuit does not now employ either of these procedures, but Judge Wallace's concurring opinion in *Hernandez I* and *Hernandez II* seems to counsel the same types of considerations.

Similarly, the states themselves have an appropriate, albeit voluntary, role to play in assisting the judiciary in this regard, under the Civil Rights of Institutionalized Persons Act, 42 U.S.C. § 1997 *et seq.*, and see in particular 42 U.S.C. § 1997e(b). The Ninth Circuit does not now employ this procedure with regard to California prisoners because California has not elected to establish the administrative remedies encouraged by the Act. The *Spears* and *Martinez* procedures, and the remand in this case, however, address the same considerations. See also *McCarthy* v. *Maddigan*, 914 F.2d 1411 (10th Cir. 1990), cert. granted —— U.S. ——, 111 S. Ct. 1618, 113 L.Ed.2d 716 (1991).

Adoption of procedural requirements of this type, either instead of or together with imposition of a heightened pleading requirement standard, would be consistent with, and an appropriate construction of, this Court's *Neitzke* language pertaining to 'pierc[ing] the veil" of the factual allegations presented by indigents, whether they be prisoners or not. Such adoption would also address the "short sabbatical in the nearest courthouse" concern,[26] by enabling district courts to review *forma pauperis* prisoner complaints in a way which would enab'e them, on the

[26] See *Cruz* v. *Beto*, 405 U.S. 319, 327 (1972) (Rehnquist, J., dissenting).

basis of objective standards, to dismiss the "fanciful" ones prior to trial, pursuant to an informed exercise of the "rational vs. credible" distinction proposed here as a standard for interpreting Section 1915(d).

3. *Summary Judgment Procedures.*

Not every case that survives a Section 1915(d) dismissal at its outset will necessarily survive to trial. This Court's interpretation of Rule 56, FRCP, permitting summary judgment in cases where no *genuine* issue of material fact exists, can inform the role of district courts in *forma pauperis* actions. The term "genuine issue" means an issue "[w]here the record taken as a whole could not lead a *rational* trier of fact to find for the nonmoving party." *Matsushita Electric Industrial Co., Ltd.* v. *Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). (Emphasis added.) And if the factual context renders a party's claim implausible, that party must come forward with more persuasive evidence to support its claim than would otherwise be necessary. *Ibid.* The proper inquiry, however, is whether *the evidence* presents a sufficient disagreement to require submission to a jury.[27] Here, although petitioners filed answers to two of the complaints in the three subject cases, they have never submitted affidavits denying the allegations against them and seeking to force Hernandez to present the required degree of contrary evidence.

It might be argued that Rule 56(e) does not require a moving defendant to present *any* affidavits or other evidence negating a prisoner's complaint, see *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 323 (1986), and that Section 1915(d) should be treated in like manner. Such an argument, however, would ignore the fact that, unlike the situation in a Section 1915(d) dismissal, the responding party to such a motion would always have the opportunity to present its own evidence in opposition to such a motion, even if the moving party did not support its motion by affidavits or other evidence.

[27] It is interesting to note the similarity between this Court's reference, in *Neitzke*, to "pierc[ing] the veil of the complaint's factual allegations" and the Advisory Committee's Note to the 1963 Amendment to Rule 56(e), to the effect that the purpose of summary judgment is to "pierce the pleadings and to assess the proof". *Matsushita*, *supra* at 587.

Thus, a judicious use of FRCP motions will enable the great majority of cases postulating unlikely facts to be resolved in a manner short of trial, but under procedures which do not arbitrarily distinguish between paying plaintiffs and *forma pauperis* plaintiffs in a manner which calls into question (a) constitutional issues of access to the courts and (b) statutory issues of construction and congressional intent.

4. *Vexatious Litigant Procedures.*

A distinction should be drawn between plaintiffs who file many complaints, which have uniformly ultimately been found to be meritless, and plaintiffs who file only one or two complaints which may, individually, postulate claims of a highly unlikely nature. The courts, including this Court, have tended to focus upon the "repeater" as the type of plaintiff against whom frivolousness dismissals or denials are appropriate. See, e.g., *Zatko* v. *California* (No. 91-5052, November 4, 1991). But Section 1915(d) authorizes dismissals of *forma pauperis* complaints for two separate and distinct reasons: frivolousness and malice. The courts have tended not to address the "malice" prong of the statute. Repeaters, however, would seem more appropriately to fall within that prong than within the "frivolous" prong. This Court itself teaches, in *Neitzke*, *supra* at 328-329, that claims subject to dismissal under Rule 12(b)(6) are not necessarily frivolous in nature. An ultimate finding of lack of merit does not mean that a complaint is frivolous. And an ultimate finding of lack of merit as to many complaints by a single prisoner does not establish that any of those complaints, individually, were frivolous.

The "repeater" plaintiff, however, may be subject to appropriate control under the "malice" prong of Section 1915(d), which would eliminate the necessity of district courts having to inquire into the types of factual and credibility questions which Hernandez believes to be improper. Some courts, by local rule, have established procedures protecting against vexatious litigants. For example, the Eastern District of California, from which these cases have arisen, has by local rule incorporated California's vexatious litigant statute. E.D. Cal. Local Rule 151(b), incorporating Section 391 *et seq.* of the California Code of Civil Procedure.[28] While vexatious litigant statutes are directed toward the furnishing of security, the concept that they address is relevant to the question of malice within the meaning of Section 1915(d).

If this analysis were to prevail, the Court would look not at the factual allegations of Hernandez' complaints, but at his procedural history in light of the factors described in footnote 28 of this brief. That procedural history would show that, at the time these cases were dismissed, (a) Hernandez had filed two cases which had been dismissed, (b) although he had more than five other cases pending, there was no showing that he had *unjustifiably* failed to bring them to trial within two years, and

[28] At the time these cases were before the District Court, a "vexatious litigant" was defined in California as one who (a) had unsuccessfully prosecuted, *in propria personna*, five actions within a seven-year period, (b) had unjustifiably permitted five such actions to remain pending at least two years without bringing them to trial, or (c) had repeatedly relitigated or attempted to relitigate, *in propria personna*, the same claims determined by a prior action. The definition was broadened in 1990 to include (d) the repeated filing of unmeritorious motions, pleadings or other papers, and (e) the status of having previously been declared by another court to be a vexatious litigant. The common thread among all of these definitions is that either there had been a previous judicial determination of lack of merit in the prior cases or the plaintiff had *unjustifiably* failed to bring them to trial or hearing within two years.

(c) none of the cases that he had filed had been decided against him on the factual merits.[29] If the District Court's local rule were to serve as an appropriate measure of its discretion to determine "malice" within the meaning of Section 1915(d), Hernandez' cases would not have been dismissed on that ground.

C. Rule 11, FRCP.

The United States as amicus curiae, like Hernandez, argues that an objective standard should govern the actions of district courts under Section 1915(d). The United States argues, however, that the objective standard should mirror that found in Rule 11, FRCP. In Hernandez' view, however, although Section 1915(d) and Rule 11 have similar and somewhat overlapping aims, the manner in which they are procedurally enforced is, or should be, mutually exclusive.

Rule 11 permits district courts, where violations of the Rule are found, to impose appropriate sanctions upon the violator. Like Section 1915(d), the central purpose of Rule 11 is to deter baseless filings in district courts. *Cooter & Gell* v. *Hartmarx Corp.*, 496 U.S. ——, 110 S.Ct. 2447, 110 L.Ed.2d 359, 374 (1990). The Advisory Committee's Notes to the 1983 amendment to Rule 11, however, disclose several reasons why *sua sponte* dismissals under Section 1915(d) cannot be procedurally justified by reference to the common goals of Rule 11. A Rule 11 violation finding will always follow the giving of prior notice to the alleged offender and an opportunity to that offender to defend his conduct.[30] In the case of pleadings, the issue "normally will be determined at the end of the litigation," at a time when the facts have been found after presentation of evidence. "The procedure obviously must comport with due process requirements."

[29] But see Hernandez' discussion in footnote 16, *supra*.

[30] Indeed, this concept seems to echo the rationale of Judge Wallace's concurring opinion below.

Advisory Committee Notes, *supra*. See also, generally, Comment Note—Procedural Requirements for Imposition of Sanctions Under Rule 11, Federal Rules of Civil Procedure, 100 A.L.R. Fed. 556 *et seq.*

The very purpose of Section 1915(d) dismissals, on the other hand, is to enable district courts to rid their dockets of frivolous cases at the onset of those cases without having to afford full due process procedures or factual or evidentiary hearings based on the presentation of evidence supporting (or not supporting) the pleadings.[31] Although the goal of discouraging frivolous litigation may be the same, the differences in procedural protections between Section 1915(d) and Rule 11 are so significant as to preclude the latter from forming a reasonable basis for the construction of the former. Moreover, controversy appears to exist with regard to the vigorous application of Rule 11 to cases filed by civil rights plaintiffs generally. See, e.g., 5A Wright & Miller, *Federal Practice & Procedure*, § 1332, pp. 33-35. That controversy should not be exacerbated by applying Rule 11 standards to a context in which Rule 11 procedural protections do not exist.

The United States argues that no reasonable lawyer would file a complaint involving implausible allegations, because of the risk of Rule 11 sanctions. Whether or not lawyers[32] would be deterred from filing complaints

[31] The United States points to the statutory term "satisfied" as constituting the measure of district courts' authority to determine frivolousness and thus dismiss cases pursuant to Section 1915(d). This reference simply begs the question of how a district court is to become "satisfied," whether by evidence or determination of factual irrationality, or solely on instinctive and *ad hoc* disbelief by individual district judges (or their staffs) of the alleged facts. Indeed, the Ninth Circuit's judicial notice standard may be viewed as an effort to set objective limits on the ephemeral concept of becoming "satisfied."

[32] Lawyers are moved by many motivations besides the possibility of Rule 11 sanctions, in deciding whether or not to take on particular cases. For example, lawyers frequently take cases on an hourly-rate basis which they would not consider taking on a contingent-fee basis. Rule 11 does not address these collateral types of motivations.

thereon, however, does not meet what Hernandez believes to be the more appropriate and proper question: would a financially solvent plaintiff, appearing *pro se*, be deterred from filing a complaint with implausible allegations? It is quite likely that a strongly opinionated *pro se* plaintiff[33] would not be deterred. And, as indicated by world events in 1991, infrequently but occasionally some very implausible things turn out to be true! Given that the intent of the *in forma pauperis* statute is to attempt to place poor persons into positions of relative equality with the rich, the deterrent effect upon the committed solvent plaintiff himself and not the deterrent effect upon a retained lawyer should be the measure by which Section 1915's promise of equal treatment is measured.

D. Judicial Efficiency.

Denials of motions to proceed *in forma pauperis* are appealable. *Roberts* v. *United States District Court*, 339 U.S. 844, 845 (1950). Dismissals of *forma pauperis* complaints are also appealable, as final judgments. 28 U.S.C. § 1291. Judicial efficiency will not be well served by creating "satellite litigation" over the question of whether particular allegations are frivolous as opposed to simply being unlikely. This Court must consider the efficiency of the entire judicial system, not just that of district courts:

> "While the premature dismissal of a suit may temporarily relieve some of the burdens on the district

[33] It also should not be assumed that the ability to pay a filing fee equates with the existence of sufficient assets to take a party out of the "judgment proof" category in terms of Rule 11 sanctions measured by significant attorneys' fees. To this extent, the threat of Rule 11 sanctions against a paying *pro se* plaintiff is substantionally the same as that threat against a *forma pauperis* plaintiff, i.e. minimal.

> courts, it also creates an ambiguous record which is destined to haunt both the appellate and trial courts for months—and perhaps years. . . . [R]esponsive pleadings might produce a more secure ground for disposition at the trial level and render useless any appeal."

Jones v. *Morris, supra*, 777 F.2d 1277, 1280-1281 (7th Cir. 1985); and see *Elliott* v. *Bronson*, 872 F.2d 20, 21 (2d Cir. 1989) (avoid "wasteful shuttling of the lawsuit between the district court and the appellate courts").

E. Standard of Review.

The United States as amicus has also challenged the propriety of the Ninth Circuit's review of the dismissals in these actions on a *de novo* basis. The United States asserts that both the statutory language of Section 1915(d) and this Court's language in *Boag* v. *MacDougall*, 454 U.S. 364, 365 n.* (1982) lead to the conclusion that dismissals under the statute are discretionary in nature, and should be reviewed under an "abuse of discretion" standard. Whatever may be the merits of that argument generally, however, it should not prevail *in this case*.

The language which provides that district courts "may" dismiss under Section 1915(d) is simply language of empowerment, and does not speak to the standards under which such dismissals are to occur. Similarly, the language which empowers such dismissals if the district court is "satisfied" that a complaint is frivolous represents no more than a description of the court having reached a conclusion, and does not speak to the manner in which that conclusion has been reached. See footnote 31 of this brief, *supra*.

Indeed, both the *Boag* holding and the very footnote cited by the United States support Herdandez' position in this matter. In *Boag* the Ninth Circuit had dismissed a prisoner's complaint as frivolous because it did not state

a claim upon which relief could be granted. *Nietzke*, of course, teaches that a failure to state a claim does not render a complaint frivolous. But this Court, in a *per curium* decision reversing the frivolousness dismissal, noted that prisoner Boag's complaint was sufficient to state a claim, and that "on the basis of the record before us, we cannot find a sufficient ground for affirming the dismissal of the complaint." *Id.* at 365. The majority declined to consider various matters which had not been considered by the lower court, even though judicial notice might properly have been taken of those matters had request therefor been made. *Id.* at footnote *. The Court expressly stated that "[a] question of that character [the effect of judicially noticeable non-disclosure of previous lawsuits] must be addressed in the first instance by the District Court." *Ibid.* The Court also articulated the desirability of an explanatory statement "by the District Court to facilitate intelligent appellate review." *Ibid.*

In the present matter, the Court of Appeals' vote necessary to create a majority for vacating the District Court's dismissals was based solely on procedural non-compliance by the District Court with established Ninth Circuit procedural case law. That case law requires district courts to advise *pro se* plaintiffs of the deficiencies in their complaints and to give them an opportunity to amend *in light of that advice*, before dismissing the complaints. In the Ninth Circuit, this obligation is not discretionary with district courts; it is mandatory, and it was not followed here. Accordingly, in these cases the Ninth Circuit did not apply an erroneous standard of review, regardless of whether an "abuse of discretion" standard should or should not normally apply to Section 1915(d) dismissals.[34]

---

[34] Alternatively, even if the Court were to determine that the "abuse of discretion" standard espoused by the United States is appropriate in reviewing Section 1915(d) dismissals, this Court has also noted that a "district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law". *Cooter & Gell* v. *Hartmarx Corp., supra*, 496 U.S. at ——, 110 S.Ct. at ——, 110 L.Ed.2d at 382.

Because the United States has raised the general question, however, a response thereto is appropriate. In Hernandez' view, district courts have discretion to take or not take judicial notice of objectively ascertainable facts to assist them in determining whether specific allegations are or are not either irrational or objectively untrue. They also have discretion to determine whether a given set of factual allegations are rational or irrational. They do not, however, have discretion to make credibility determinations on the factual veracity of allegations concerning which contrary judicial notice is impermissible. Were it otherwise, Hernandez believes that a contrary result would have obtained in *Boag, supra.*

CONCLUSION

The judgment of the United States Court of Appeals for the Ninth Circuit, in *Hernandez II*, should be affirmed.

Respectfully submitted,

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No. 90-1846

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1991

GEORGE F. DENTON, et al., Petitioners,

v.

MIKE HERNANDEZ, Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

PRELIMINARY STATEMENT

Certiorari was granted by this Court on November 4, 1991. Petitioners' Brief on the Merits was served on December 12, 1991. On January 3, 1992, respondent served his brief on the merits. The United States has filed its *amicus curiae* brief in support of petitioners and

petitioners have consented to the filing of an *amicus curiae* brief in support of respondent by the American Civil Liberties Union.

SUMMARY OF ARGUMENT

A review of the briefs of the parties and *amicus curiae* indicates that there is no one who speaks with favor of the exclusive "judicial notice" rule announced in **Hernández I** and **Hernandez II.** This rule should be overturned because of its absurd result in the clearest category of frivolous case, that where the plaintiff makes abstract grand assertions which are incapable of refutation by objective fact.

Two themes remain in the briefs. The first, advanced by respondent, is that under a proper formulation of frivolity, the three complaints he has chosen to advance on appeal are not frivolous. However, a scrupulous examination of the five complaints which were considered and dismissed together by the district court reveals that under no test advanced by any court except the Ninth Circuit would the complaints have survived. An objective analysis of the entire record shows that there were substantial indicia of frivolity within the four corners of the complaints in question to sustain the district court's decision to dismiss those complaints. These indicia were respondent's manifest mental incapacity and the nature, number and quality of his pleadings within the district.

The second theme advanced by counsel is an impatience with the various verbal formulations associated with the definition of frivolity. All circuits, with the

exception of the Ninth Circuit, have expanded the language of *Anders* and *Neitzke* within permissible bounds but both respondent and the United States request a uniform interpretation which would eliminate the possibility of variance among the circuits. Petitioners suggest that the laudable goal of uniformity must be reconciled with the statutory grant of discretion to the district courts in these matters and the retention of an abuse of discretion standard of review in the circuit courts.

ARGUMENT

I. THE RECORD SUPPORTS THE DISTRICT COURT'S FINDING THAT THE THREE COMPLAINTS WERE FRIVOLOUS

Respondent argues that his complaints were neither irrational nor otherwise objectively disprovable by judicially noticed facts (**Respondent's Brief on the Merits** at 15), and therefore were not frivolous. As to the latter factor, he accepts the exclusive "judicial notice" test uncritically and does not address the lineage, operation, or ultimate wisdom of this unique Ninth Circuit rule. Upon a close reading of his brief, cannot be counted as one of the rule's most enthusiastic or active proponents. Petitioners have addressed this purely legal issue in their Brief on the Merits, but it appears that no party or *amicus curiae* supports the exclusive "judicial notice" rule announced by the Ninth Circuit.

This matter has therefore advanced from consideration of whether the exclusive "judicial notice" rule

should be overturned. Two major areas of concern remain. The first is whether under a proper formulation of frivolity, the three complaints respondent has advanced on appeal should continue to be litigated. However, examination of the five complaints considered and dismissed by the district court shows that the complaints were frivolous under *Anders* and *Neitzke*. The second area, dealt with in Argument II, *infra*, is that a uniform definition of frivolity must be issued by this Court.

The principal thrust of respondent's Brief on the Merits is that the record shows the complaints were rational and therefore not frivolous. However, the following review of the record shows that there is ample support for the district court's conclusion that the complaints were frivolous because the allegations were wholly fanciful and in many cases were countered by facts susceptible of judicial notice. Therefore, respondent's contention that his allegations were rational is meritless.

A. Events Prior to Conviction

The following events are set forth in *Hernandez v. Ylst*, 930 F.2d 714 (9th Cir. 1991) and that opinion obviously follows by several years the district court's decision to dismiss the complaints. However, *Ylst* provides corroboration at this point in time for conclusions about respondent's mental state when he wrote the complaints.

On January 16, 1982, respondent was arrested for the killing "of a man who, at least in Hernandez's mind, was having an affair with Hernandez's wife." *Hernandez*

v. Ylst, 930 F.2d at 715. At his counsel's request, a hearing to determine respondent's competency to stand trial was calendared but subsequently was taken off calendar at counsel's request. Respondent instead moved for a transfer from the San Luis Obispo county jail to the Santa Barbara county jail. His statement in support of this motion was comprised of "'bizarre statements of mistreatment in the jail', including allegations of forced drug injections by jailers and sexual assaults by fellow prisoners." Id. at 715, n. 4. The motion for the transfer was denied and the matter proceeded to trial.

During the trial, respondent entered a plea of not guilty by reason of insanity. The jury trial was adjourned and three mental health experts were appointed to examine respondent. Respondent stipulated to court trial upon the written reports of the three experts, a pretrial report by Dr. Lawrence Ratner, and the transcript of respondent's motion for a jail transfer. The court found respondent sane and convicted him of second-degree murder. On June 14, 1982, respondent was sentenced to a term of 15 years to life, with a two-year enhancement for weapons use. Id. at 715-716.

Dr. Ratner found respondent to be delusional and depressed at the time he saw respondent and concluded that respondent's mental deterioration would have prevented him from appreciating the criminality of his alleged conduct. However, neither Dr. Ratner's report nor any other evidence showed that respondent was incompetent to stand trial under federal law. Id. at 718, n. 2. Respondent's "undeniably weird" recounting of his

jail treatment was not, by itself, sufficient to establish incompetency. Id. at 717-718.

B. Post-trial Events Set Forth in the Complaints

1. No. S-83-0645 (June 15, 1983)

Respondent alleged that at 8 p.m. on July 29, 1982, his first night in Folsom Prison, respondent went to bed early. He slept twice as long as normal and awoke at 6 a.m. on July 30. Respondent concluded that he had been raped because he discovered "signs of rape" on his shirt and overheard officers and inmates taunting and ridiculing him about his being raped during the night. On August 5, respondent was interviewed by a classification committee and respondent displayed the shirt, noted fecal stains and complained of rape. **Amended Complaint**, No. S-83-0645 (June 25, 1983) at 5-6.

On September 29, 1982, respondent was moved into the psychiatric ward of the institution hospital for 30 days. He was then returned to security housing. Id. at 7-8. Attached to the Amended Complaint were several exhibits. One was a November 10, 1982 classification document stating that respondent had been moved from the general population to security housing on August 26, 1982 because of psychiatric problems. A psychiatric evaluation was being prepared at the time the document was composed.

2. No. S-83-1348 (Nov. 8, 1983)

Exactly a year after the first rape, on July 29, 1983,

respondent claimed he had been raped again. He claimed that he had been moved to a dormitory and raped by inmates there. He deduced that he had been raped from "evidence of sexual assault and rape on his clothing". **Complaint**, No. S-83-1348 (Nov. 8, 1983) at 4. Moreover, respondent had found four needle marks on different parts of his body. He had discovered three wounds on August 2 and the fourth on August 6. These alleged assaults occurred at the California Medical Facility. Id. at 5.

Attached to the Complaint were several documentary exhibits. One document contained respondent's diary excerpts. The July 30, 1983 entry stated that respondent deduced he had been raped because of "feces and semen stains" on his shorts. The August 2 entry stated he had been hit on the head "the night before or early [in the] morning". Presumably respondent did not remember exactly when he had been hit. He had headaches and pains in his colon, and he complained to an officer about a small scab on his wrist which he interpreted as a needle puncture wound. Another exhibit was a July 30, 1983 inmate appeal form in which respondent complained of his move to the dormitory but made no complaint of rape.

On June 14, 1984, respondent submitted an amended complaint to the district court. Respondent alleged that he had been raped on July 29, December 15, and December 16, all perceived because of "signs and evidence of rape and sexual assault on his clothing." Respondent complained to three doctors about severe pains on the right side of his head and concluded that he had been hit in the head while asleep. **Amended Complaint**, No. S-

83-1348 (June 14, 1984) at 6-8. Attached to the amended complaint were several exhibits. One was a declaration by inmate Pierce that he saw inmates Dushane and Milliard rape respondent on July 29, 1983. Another was a December 17, 1983 inmate appeal form in which respondent claimed that he had been raped on July 29, December 14 and December 16.

3. No. S-84-1074 (Aug. 20, 1984)

On August 20, 1984, respondent, still at the California Medical Facility, filed another action, No. S-84-1074. On August 13, August 16, September 1, September 21, October 2, October 12, October 14, and November 5, 1983, respondent found needle marks on various parts of his body and concluded that as he was asleep each of those nights, officers injected him with a substance that left "pot holes" on his face and chest. **Complaint**, No. S-84-1074 (Aug. 20, 1984) at 7 (typewritten section). Bacteria appeared on his face, chest and shoulders. In addition, respondent alleged "possible rape" by the officers. Id. at 6, 9.

Attached to the Complaint were certain exhibits. An August 18, 1983 inmate appeal form contained the allegation that Officer Kohler was involved in the druggings. On September 8, Officer Kohler replied that she had never entered respondent's cell. On September 13, respondent said Officer Kohler was guilty because she was on duty on August 12 and August 13. Respondent included his diary entries for various days. On August 13, respondent stated that he had found a needle puncture, a

bruise above the puncture, grass in his hair, and one blond and two brown hairs. He was also constipated. Based on this evidence, he stated "these are all signs of sexual assault and rape after being drugged". He concluded that the officers on duty were responsible. Similar conclusions are made in the entries for August 16 and September 1.

On October 21, respondent saw a doctor and was recommended for group therapy. On October 24, respondent felt ill and concluded: "There are signs of being drugged on my face; there are bumps, red spots and bacteria, which my body's system is getting rid of through my skin; there is bacteria on my chest and chin, too." On November 10, respondent noted that he "had bacteria coming out of different parts of my body". Respondent received Panoxyl, an acne treatment, from the doctors. An October 19 memorandum stated that there was no evidence to support respondent's allegations of being raped on August 15. Finally, a December 23, 1983 evaluation by a psychiatrist was included. The evaluation stated:

> There is nothing new to his paranoid ideation. He continues to be susp[i]cious and refuses medications that would help with his thinking process. His condition is not such that he would qualify for forced medication without his permission. My assessment is that he is

suffering from paranoia (D.S.M. Category #297.10).[1/]

---

1. This reference is to the third edition of the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* (1980). The pertinent section, section 297.10, describes delusional or paranoid disorders and describes two common types as follows:

> **Persecutory Type.** This is the most common type. The persecutory delusion may be simple or elaborate, and usually involves a single theme or series of connected themes, such as being conspired against, cheated, spied upon, followed, poisoned or drugged, maliciously maligned, harassed or obstructed in the pursuit of long-term goals . . . . In certain cases the focus of the delusion is some injustice that must be remedied by legal action ("querulous paranoia"), and the affected person often engages in repeated attempts to obtain satisfaction by appeal to the courts . . . .
>
> **Somatic Type.** Somatic delusions occur in several forms. Most common are convictions that the person emits a foul odor from his or her skin, mouth, rectum, or vagina; that he or she has an infestation of insects on or in the skin; that he or she has an internal parasite; that certain parts of his or her body are, contrary to all evidence, misshapen and ugly, or that certain parts of his or her body . . . are not functioning.

4. No. S-84-1198 (Sept. 17, 1984)

No. S-84-1198, filed on September 17, 1984, alleged respondent's discovery of needle marks on November 27, December 4, and December 13, 1983. Respondent concluded that he had been injected with a substance that left deformities and small potholes on his face and chin. **Complaint**, No. S-84-1198 (Sept. 17, 1984) at 14 (typewritten section). The exhibits to this complaint indicate that petitioner, in his diary entries, suspected that he had been raped on the occasions in question. The December 8, 1983 entry describes respondent's interruption of a tour group visiting the prison.

> I holler: "Do you people want to know what goes on in here? After 11 p.m., the guards drug you and fuck you."
>
> I could not help but notice that some of the women in the group were surprised to he[ar] me say those things, for their expression was one of hysteria, and their eyes were as big as silver dollars.
>
> When the group again reached the front section of my cell, I hollered again; this time I yelled: "A man was rape after he was drugged . . . on November 26, by the guards who come in, after 11 p.m. . . . Last Saturday, an inmate in isolation was roughed-up, handcuffed, and possibly made to confess or maybe drugged."

> As I was hollering all this, I noticed a woman in the group had a very surprised look on her face, and I could not help but laugh. Officer Johnson seemed very surprised and blushing. I asked: "What is wrong? Do you want to beat me up?" Officer Johnson did not respond, but turned around and walked to the front section of the unit . . . .

On October 2, 1983, respondent was found painting a replica of a chimney on his wall. On December 12, 1983, respondent submitted an inmate appeal form which alleged he was raped on November 26 and December 3. He also stated he had been hit in the head while asleep on December 12. The prison lieutenant answered that the allegations seemed to be the product of his mental illness and that no one had harmed him. On December 12, respondent threatened to kill an officer.

5. No. S-85-0084 (Jan. 21, 1985)

This was the last of the five complaints considered by the district court. Respondent alleged that on January 13, 1984, an officer allowed two inmates to enter his cell while he was asleep. "They sexually assaulted and possibly raped and drugged [him] as he laid asleep on his bunk." **Complaint**, No. S-85-0084 (Jan. 21, 1985) at 15-16. A supporting declaration from inmate Esquer alleges that he witnessed the assaults and that respondent contracted AIDS as a result of the attack.

Respondent found needle marks and sometimes bacteria on his body on March 13, March 23, June 29, August 4, August 23, September 11, October 8, October 28, November 25, December 5, and December 9, 1984. Id. at 17-21. He found symptoms of rape on his body on May 23, and alleged that he had been raped on August 4, August 23, September 11, October 8, and November 25. Id. It appears that respondent implied he was assaulted on all the other dates as well.

The exhibits attached to the complaint include excerpts from respondent's diary. On July 9, 1984, respondent concluded that on September 9 and November 16, 1983, both he and his wife were drugged and assaulted during a conjugal visit because there were bruises on his wife's left buttock. Respondent notes on August 4, 1984, that the needle mark was on his penis. On December 10, 1984, respondent admitted throwing detergent at an officer. The needle mark he had discovered had a burn on it to disguise the needle mark. On December 11, 1984, respondent describes a session with dentist Kurk:

> The procedure was a little painful, but I enjoyed it, as she was willing to perform her services with plenty of close-up attention and this allowed me to appreciate her beauty and ardent aroma with a lot of pleasure and desire.

On March 13, 1984, in an inmate appeal form, respondent stated that he was taking Mellaril, an anti-psychotic drug. See *Physicians' Desk Reference* (45th ed. 1991) at 1950-1951.

C. An Evaluation of the Record

The record shows respondent to be a desperately ill individual with a diagnosed mental disorder and receiving anti-psychotic drugs. He has engaged in a bizarre but consistent round of accusations against his keepers which first manifested itself in 1983 and continued at least until 1985. The accusations are consistent with his psychosis. He has engaged in continual litigation (see **Petitioners' Brief on the Merits** at 1-2, n. 1, n. 2) in a manner consistent with his clinical diagnosis. His dysfunctional ideation is manifested in random verbal assaults on visitors, in erotic imaginings during a dental visit, in jealous claims regarding assaults on his wife, and in claims that bacteria are exuding from his pores and deforming his skin. It is evident that the five complaints are "the hallucinations of a troubled man." *Hernandez v. Denton*, 861 F.2d 1421, 1440 (9th Cir. 1988) (Aldisert, J., dissenting) hereinafter as "**Hernandez I**".[2/]

It is also manifest that the complaints, read as a whole as the district court did, are frivolous under any test uttered by any federal court except the exclusive "judicial notice" test announced by the Ninth Circuit in **Hernandez I** and **Hernandez II**. Initially it must be pointed out that the complaints would not survive a Rule 12(b) motion and this failing is consistently admitted by the majority. **Hernandez I**, 861 F.2d at 1427; *Hernandez v. Denton*, 919 F.2d 573, 575-576 (9th Cir. 1990), attached hereto as

2. **Hernandez I** is set forth in Appendix B.

Appendix C; *Hernandez v. Denton*, 929 F.2d 1374, 1376-1377 (9th Cir. 1991) hereinafter as "**Hernandez II**". *Neitzke* of course holds that this failure of pleading does not render the complaints frivolous. However, from the onset the complaints are seriously defective in logical progression. See **Hernandez I**, 861 F.2d at 1438-1439 (Aldisert, J., dissenting).

Therefore, the complaints portray in depth an individual who, perhaps because of mental illness, is incapable of phrasing complaints which tie dates, individuals, and acts together in logical fashion. As they stand, the complaints lack an arguable basis in fact because the allegations do not rationally imply injury or causation. Assuming that respondent was reporting his observations in a lucid manner, fecal or semen stains on clothing do not mean that the correctional officers on duty during the night had sexually assaulted respondent. Needle marks do not indicate that the officers had drugged respondent for the purpose of sexually assaulting him. Bruise marks on respondent's wife's buttocks do not indicate that respondent and his wife were sexually assaulted while they were sleeping. Argument that there is a causal link between respondent's observed facts and his conclusions is not logically valid. See **Hernandez I**, 861 F.2d at 1433-1434, 1438-1439 (Aldisert, J., dissenting); **Hernandez II**, 929 F.2d at 1378 (Aldisert, J., dissenting). The unanimous legal conclusion of the Ninth Circuit that the complaints failed to state a case should not obscure the fact that the allegations of the complaints are fundamentally illogical.

Fundamentally illogical allegations would always seem to be fantastic and delusional, and moreover allegations from an individual with a diagnosed delusional disorder would seem to be presumptively delusional if they are illogical and beyond the realm of normal behavior. Respondent's own exhibits establish the disorder, and there is no need to apologize for consideration of respondent's mental illness. It is simply a known factor to be taken into account. Compare **Respondent's Brief on the Merits** at n. 13. The obvious delusional aspects of the record inform the more rational parts of the record. The district court did not state that because respondent was mentally ill, his allegations were to be disbelieved. Rather, the district court found the totality of the record to be non sequiters incapable of coherent litigation.

Assuming arguendo that credibility[3/] judgments are not to be the basis for frivolity determinations, there is no requirement that subjective evaluations must be abandoned together. When a fantastic claim, such as the plaintiff being Muhammed, is rejected by a district court, it cannot possibly rely on objective facts. Such a claim is frivolous based on subjective considerations. Similarly, if a complaint asserts illogical sequences of cause and effect, it is subjectively frivolous even if such illogical claims are

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3. The use of the term "credibility" in this context is a misuse of a term of art. See *U.S. v. Carbo*, 314 F.2d 718, 749 (9th Cir. 1963). What the Ninth Circuit sought to proscribe in *Franklin v. Murphy*, 745 F.2d 1221, 1228 (9th Cir. 1984), was any excessive and unrestricted subjective evaluation of the plaintiff based on the record.

not as dramatic as the most obviously absurd claims pursued by plaintiffs.

Having made the defective claims in his five complaints, respondent compounds the error with his assertion on appeal that the number of his alleged assaults is not fantastic because assaults happen in prison, officers could perform the assaults, and that if one wanted to assault and could get away with it, one would assault as frequently as possible. **Respondent's Brief on the Merits** at 23. Such an accretion of speculation cannot repair the logic of the assertions made in the complaints. The record amply supports the district court's finding of frivolity.

II. THIS COURT MUST ISSUE UNIFORM GUIDELINES FOR THE DETERMINATION OF FRIVOLITY

There is no shortage of verbal formulas intended to clarify the term "frivolous" in 28 U.S.C. section 1915(d). See **Petitioners' Brief on the Merits** at n. 4; **Brief for the United States** at n. 4. Moreover, there are substantial procedural devices which might be utilized as supplements to or in place of frivolity determinations. **Respondent's Brief on the Merits** at 23 et seq. The issue of frivolity is one that encourages expansion and experimentation and simultaneously creates a desire for the one "objective" formula or method which will yield consistent results. **Respondent's Brief on the Merits** at n. 8.

Ultimately the source of this attempt to define and

elucidate is an inherent linguistic problem arising from the use of the term "frivolous". The word is fundamentally judgmental and subjective. See **Petitioners' Brief on the Merits** at n. 12. The drafters of the statute intended to convey the sense of little weight, no importance, no basis in law or fact, destitute, and groundless, and there is no practitioner who uses the term without intending a perjorative meaning. This does not mean that all the tools of formal logic or objective analysis are abandoned when frivolity is determined but rather that a value judgment must be placed upon the matters appearing in the whole record. The Ninth Circuit misperceives the issue before the district court in the instant case as one in which credibility judgments were made, i.e. one in which the district court chose to disbelieve the plaintiff. Rather, the district court dealt with the fundamentally illogical allegations in light of its responsibility to balance "meaningful access" against "the inconvenience and expense" attendant to the prosecution of meritless cases. *Neitzke v. Williams*, 109 S.Ct. 1827, 1831 (1989).

Bearing in mind the inherently subjective nature of the determination, petitioners respectfully suggest that *Anders* and *Neitzke* may be the most precise explanation of what the Congress intended when it drafted the statute. The plain meaning of "frivolous", with its inherent implication of analysis and judgment, may be the most pragmatic of tests available. However, the suggestion of the United States that the Rule 11 test, "well grounded in fact", be utilized in the interpretation of "frivolous" in section 1915(d) has the advantages of reference to a well-developed caselaw and of returning some responsibility to

the plaintiff for the drafting of coherent complaints. **Brief of the United States** at 13-14.

The exclusive "judicial notice" rule announced in **Hernandez I** and **Hernandez II** is an extreme example of a verbal formula which robs the district court of any independence in determining frivolity. Implicit in the Ninth Circuit's criticism of the district court's decision and in the existence of the Ninth Circuit's singular de novo review of frivolity determinations is a curious reluctance to accord the district court any substantial role in screening its own cases. This arrogation of power is not sanctioned by the statute or the law of the other circuits.

Moreover, it is unwise to engraft procedures which result in the abrogation of the district court's discretion. If the Ninth Circuit exclusive "judicial notice" rule is not a verbal formula, then it is a procedure supposedly intended to obtain objective and uniform results. The rule's ineffectiveness when applied to the most obvious of frivolous cases, the absurd theological contention, is a warning that if a uniform procedure is to be imposed, then much consideration should be made of the implications of such a rule.

This Court, in exercising its inherent power to regulate the business of the federal courts, should consider whether the construction of a formal and rigid rule may further encumber the district courts with more "procedure" without benefit. The frivolity determination is neither an adversarial stage nor a crucial stage of litigation for constitutional purposes and the promulgation of an overly

complex uniform procedure may result in according more process than is due under section 1915(d).

CONCLUSION

Petitioners respectfully suggest that the record amply supports the district court's finding of frivolity and that a decision by this Court reversing the decision of the Ninth Circuit would reestablish the primacy of discretion in frivolity determinations. This would be consonant with the intent of the drafters of section 1915(d) and the plain meaning of the statute. Finally, this Court should consider a reiteration of a uniform test for frivolity determinations which is consistent with the language of section 1915(d).

DATED: January 13, 1992

Respectfully submitted,

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APPENDIX B

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Mike Hernandez, *Plaintiff-Appellant*, v. George F. Denton, et al., *Defendants-Appellees*.	Nos. 86-2139; 87-1693/1694 D.C. No. CV S-83-0645-LKK OPINION

Appeal from the United States District Court
for the Eastern District of California
Lawrence K. Karlton, District Judge, Presiding

Argued and Submitted
January 12, 1988 — San Francisco, California

Filed November 23, 1988

Before: Ruggero J. Aldisert,* J. Clifford Wallace, and
Mary M. Schroeder, Circuit Judges.

Opinion by Judge Schroeder; Concurrence by Judge
Wallace; Concurrence and Dissent by Judge Aldisert

*Honorable Ruggero J. Aldisert, Senior United States Circuit Judge for the Third Circuit, sitting by designation.

SUMMARY

Civil Rights/Prisons and Jails/Courts and Procedure

The court of appeals affirmed in part and reversed in part a district court judgment. The court held, inter alia, that the district court erred in making a credibility determination in dismissing a prisoner's pro se complaint alleging numerous prison rapes as "wholly fanciful."

Appellant Mike Hernandez, a prisoner at Vacaville Medical prison in California filed in forma pauperis suits against prison officials at a number of prisons. Hernandez filed five pro se complaints alleging 42 U.S.C. § 1983 violations, including due process claims that he was placed in administrative segregation without written notice of reasons, an opportunity to present evidence, have an attorney represent him, and without written justification. The complaints also alleged Eighth Amendment violations for having to sleep on the floor without a mattress for one night and without a blanket for an unspecified number of nights, that he was not issued shoes for a month, and that he was physically and verbally abused by prison officials. The complaint also alleged that he was drugged and homosexually raped over 28 times by both prisoners and prison officials. The district court, on the magistrate's recommendation, dismissed the complaints because, when viewed together, the rape allegations were frivolous under 28 U.S.C. § 1915(d).

[1] The district court properly dismissed the due process claims; the Due Process Clause does not require detailed written notice of charges, representation by counsel, an opportunity to present witnesses, or a written decision justifying the reasons for placing a prisoner in administrative segregation. **[2]** However, Hernandez may be able to state an Eighth Amendment claim based on his having been deprived of shoes for a month and that he slept without a blanket for an unspecified amount of time as they may indicate wanton infliction of pain or deliberate indifference on the part of prison officials. Accordingly, Hernandez should be allowed to amend his complaint to claim this deprivation. **[3]** But, Hernandez' allegation that he slept without a mattress for only one night is insufficient to state an Eighth Amendment claim and no amendment can alter that deficiency. **[4]** However, Hernandez' rape claims by prison guards and prisoners, if construed liberally, may indicate deliberate indifference on the part of prison officials. **[5]** Moreover, prison beatings by guards may involve a deprivation of a liberty interest in violation of due process and insufficient protection of a prisoner resulting in harm inflicted by other inmates may also violate a prisoner's due process rights. **[6]** A district court should not dismiss on its own motion an in forma pauperis complaint unless it has no arguable substance in law or fact, including the recitation of bare legal conclusions without supporting facts, the claims are redundant or barred by res judicata, the defense is obvious and complete based on the pleadings and court records, or the claims are "wholly fanciful." **[7]** In this case, the district court erred in dismissing the claims as wholly fanciful based on an exercise of credibility

determination because the alleged facts are not impossible in light of any judicially noticeable fact.

Judge Wallace, concurring, agreed that Hernandez should be allowed to amend his complaints, if he can, to add allegations that would establish the connection of each defendant to the deprivations that he claims and that he has been the victim of unconstitutional conduct rather than mere negligence. However, should Hernandez fail to remedy the problems in his complaint, the court should dismiss his claims as frivolous.

Judge Aldisert concurred with the majority regarding the dismissal of the due process and the Eighth Amendment mattress claims. However, he dissented from the Eighth Amendment rape and related claims. Judge Aldisert opined that the majority was giving Hernandez a second notice that his complaints were to be dismissed and could be amended a second time to make factual averments to permit him to mount the hurdle of frivolity.

COUNSEL

Richard W. Nichols, McDonough, Holland & Allen, Sacramento, California, for plaintiff-appellant.

Patricia C. Esgro, Deputy, Attorney General, State of California, Sacramento, California, for defendants-appellees.

OPINION

SCHROEDER, Circuit Judge:

Appellant is a prisoner proceeding in forma pauperis in suits against prison officials at a number of prisons. He appeals the district court's dismissal of three complaints as "frivolous" under 28 U.S.C. § 1915(d).

Appellant filed five pro se complaints alleging 42 U.S.C. § 1983 violations. The three complaints at issue in this appeal made the following allegations:

(1) Due process claims: Appellant alleges that he was placed in administrative segregation without written notice of the reasons, an opportunity to present evidence, an opportunity to be represented by counsel or written justification. In addition, appellant alleges that he was punished before receiving procedural due process in connection with other alleged rule violations;

(2) Eighth amendment claims other than rape claims: Appellant alleges that he had to sleep without a mattress for one night and without a blanket for an unspecified period of time. In addition, he alleges that he was not issued shoes for a month. Finally, appellant alleges physical and verbal abuse by prison officials;

(3) Rape claims: Appellant alleges that he was drugged and homosexually raped over 28 times by both inmates and prison officials at different institutions.

The district court referred all cases to a magistrate. The defendants had been served and had answered with respect to some but not all of the claims. The magistrate reviewed all claims and recommended that the district court dismiss them because the complaints, viewed together, indicated that appellant's rape allegations were frivolous. The magistrate did not discuss the other claims. The district court followed the magistrate's recommendation and dismissed pursuant to section 1915(d), which provides in pertinent part as follows:

> The court may dismiss [a case proceeding in forma pauperis] if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious.

28 U.S.C. § 1915(d).

We have held that when a court dismisses a pro se complaint for failure to state a claim, the court should draft a few sentences explaining to the plaintiff the deficiencies and allows the plaintiff to amend. *Noll v. Carlson*, 809 F.2d 1446, 1449 (9th Cir.1987); *Karim-Panahi v. Los Angeles Police Dept.*, No. 86-6198, slip op. 1634-35 (9th Cir. Feb. 16, 1988). Because pro se litigants are unskilled in the law, they are prone to pleading errors. Without guidance, amendments by these litigants are made without an understanding of the deficiencies and are usually insufficient to cure deficient pleadings. Thus, when instructing pro se litigants to amend, district courts should briefly explain the complaints' deficiencies so that the pro

se plaintiffs will be better equipped to amend correctly. *Noll*, 809 F.2d at 1448. However, if it "is absolutely clear that the deficiencies of the complaint could not be cured by amendment," the district court may dismiss. *Franklin v. Murphy*, 745 F.2d 1221, 1228 n. 9 (9th Cir. 1984)(quoting *Broughton v. Cutter Laboratories*, 622 F.2d 458, 460 (9th Cir. 1980)).

[1] The procedural due process claims before the district court do not appear sufficient on the face of the complaints. We have ruled that, because prison safety is paramount, the procedural due process rights of prisoners are adequately protected by post-segregation decisions that administrative segregation is justified. *Touissant v. McCarthy*, 801 F.2d 1080, 1100 (9th Cir.1986), *cert. denied*, ___ U.S. ___ 107 S.Ct. 2462 (1987). "[T]he due process clause does not require detailed written notice of charges, representation by counsel or counsel-substitute, an opportunity to present witnesses, or a written decision describing the reasons for placing the prisoner in administrative segregation." *Id.* at 1100-01. In this case, appellant alleges that he was placed in administrative segregation without written notice, an opportunity to be represented by counsel or written justification; appellant did receive post-deprivation hearings. Appellant's claims fall squarely within *Touissant's* holding. Therefore, he does not state a claim for violation of due process and no amendment could cure this deficiency. These claims should be dismissed.

[2] The district court did not address the eighth amendment claims when it dismissed appellant's

complaint. The eighth amendment prescribes punishments incompatible with "evolving standards of decency" such as those "so totally without penological justification that [they] result[] in the gratuitous infliction of suffering." *Hoptowit v. Ray*, 682 F.2d 1237, 1246 (9th Cir.1982) (quoting *Gregg v. Georgia*, 428 U.S. 153, 173 (1976)). Appellant alleges that he had to sleep without a mattress for one night and without a blanket for an unspecified period of time, and that he was physically and verbally abused by prison officials. "Prison officials have a duty to take reasonable steps to protect inmates from physical abuse." *Hoptowit*, 682 F.2d at 1250. Physical and verbal abuse by officials indicates a deliberate indifference by prison officials to the safety needs of prisoners; therefore, appellant has stated an eighth amendment claim based on physical and verbal abuse because such abuse is "totally without penological justification." *Id.* at 1237.

[2] In addition, appellant may be able to state an eighth amendment claim based upon his allegation of deprivation of shoes for a month. Appellant has not alleged additional facts suggesting deliberate indifference or gratuitous infliction of suffering. He may, however, be able to state an eighth amendment claim with respect to the shoes if he amends his complaint. He should be permitted an opportunity to amend.

Appellant alleges that he slept without a blanket for an unspecified amount of time in a room across from broken windows. Appellant similarly has alleged no additional facts to indicate wanton infliction of pain or

deliberate indifference, but appellant should similarly be allowed to amend this claim of deprivation.

[3] Appellant's allegation that he slept without a mattress for only one night is insufficient to state an eighth amendment violation and no amendment can alter that insufficiency. We affirm the district court's dismissal of his claim for one night's deprivation of a mattress.

The district court's dismissal of appellant's homosexual rape claims as "frivolous" under 28 U.S.C. § 1915(d) deserves more extensive discussion. For the purposes of determining whether a complaint is "frivolous," the court presumes that the plaintiff's allegations are true. *Franklin*, 745 F.2d at 1228. In addition, courts must construe allegations in pro se complaints liberally. *Shapley v. Nevada Bd. of State Prison Comm'rs*, 766 F.2d 404, 408 (9th Cir.1985).

[4] If appellant's rape claims are not "frivolous," they may state claims for violation of both the eighth amendment and the fourteenth amendment. The eighth amendment dictates that prison officials may not be deliberately indifferent to the safety needs of inmates because such indifference may result in the unnecessary infliction of pain. *Hoptowit*, 682 F.2d at 1250. Appellant's allegations of rape by prison guards, if construed liberally, indicate deliberate indifference. His allegations that the guards allowed his rape by other prisoners, construed liberally, also indicate deliberate indifference.

[5] In addition, prisoner beatings by guards involving excessive force amounting to brutality are deprivations of a liberty interest in violation of due process. *McRorie v. Shimoda*, 795 F.2d 780, 785 (9th Cir.1986). Appellant's allegations that he was raped by prison guards are no less troubling than the claims of beatings in *McRorie*. Therefore, they state a claim for violation of appellant's substantive due process rights.

Finally, insufficient protection of a prisoner resulting in harm inflicted by other inmates may also violate the prisoner's due process rights. *Youngberry v. Romeo*, 457 U.S. 307, 315-16 (1982) (right to personal security protected by substantive due process and not extinguished by imprisonment); *Escamilla v. City of Santa Ana*, 796 F.2d 266, 269-70 (9th Cir.1986) (police have a duty to protect individuals if there is a "custodial relationship"). *See Orpiano v. Johnson*, 632 F.2d 1096, 1101 (4th Cir.1980) (if prison officials know of pervasive risk of harm to prisoner and fail to protect that prisoner, prisoner has a viable section 1983 claim for violation of his constitutional rights), *cert. denied*, 450 U.S. 929 (1981). In this case, appellant alleges that prison guards allowed other inmates to enter his cell and rape him. This allegation, if not frivolous, appears to state a claim for violation of appellant's substantive due process rights.

The district court, however, deemed the claims frivolous. Disposition of the rape claims therefore requires some understanding of what is meant by "frivolous." This court has examined the "frivolous" standard under section 1915(d) at length in *Franklin v.*

Murphy, 745 F.2d 1221 (9th Cir.1984). We there adopted procedures proposed by the Federal Judicial Center in *Recommended Procedures for handling Prisoners' Civil Rights Cases in the Federal Courts* 57-58 (1980). That influential study, chaired by Judge Aldisert, recommended that if a prisoner meets the economic requirements for in forma pauperis status, the court should permit filing of the complaint under section 1915(a) and conduct a separate and independent inquiry into whether the action is "frivolous or malicious" under section 1915(d). It noted that the definition of "frivolous" may be influenced by Supreme Court cases discussing standards for dismissal of pro se complaints. *Id.* at 60-61. *See, e.g., Haines v. Kerner*, 404 U.S. 519, 521-522, *reh'g denied*, 405 U.S. 948 (1972). *See also, Anders v. California*, 386 U.S. 738, 744, reh'g denied, 388 U.S. 924 (1967) (discussing in a different context that a contention is not frivolous if "any of the legal points [are] arguable on their merits").

With respect to legal sufficiency, the standard which has evolved is similar to that used to dismiss pro se complaints pursuant to Federal Rules of Civil Procedure, Rule 12(b)(6). *Franklin*, 745 F.2d at 1228. Under 12(b)(6), a pro se complaint should be dismissed upon proper motion if it fails to state a claim upon which relief may be granted; thus, the court will dismiss if it is "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Haines*, 404 U.S. at 521-22 (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). *See Rizzo v. Dawson*, 778 F.2d 527, 530 (9th Cir.1985).

The concept of frivolousness under section 1915(d), however, is not identical to the 12(b)(6) legal standard. Section 1915(d) permits the district court upon its own motion to weed out patently meritless claims at an early stage. However, care must be taken that section 1915(d) dismissal is not abused. *See Bounds v. Smith*, 430 U.S. 817, 821 (1977) (prisoners have constitutional right of access to the courts). In considering section 1915(d) dismissals we thus look not only to the face of the complaint and the matters actually pleaded, but beyond to whether the claims have arguable substance in law or fact. As the Seventh Circuit has explained:

> Rule 12(b)(6) permits the dismissal of a complaint for failure to state a claim upon which relief can be granted only when "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." (citations omitted). Under § 1915(d), in contrast, an *in forma pauperis, pro se* complaint can be dismissed *sua sponte* by the district court only if the petitioner cannot make any rational argument in law or fact which would entitled him or her to relief. Thus, the § 1915(d) test is less stringent than the Rule 12(b)(6) dismissal standard.

Williams v. Faulkner, No. 87-1417, slip op. at 5 (7th Cir. Jan. 12, 1988). This is a more lenient standard because

> [n]either [the opportunity to further develop a claim], nor the sharply honed adversarial exchange involved in a Rule 12(b)(6) motion and opposition, are present when dismissal is *sua sponte*. *Sua sponte* dismissal is therefore a much more truncated process than is dismissal under Rule 12(b)(6). In giving effect to the intent with which Congress created the narrow exception in section 1915(d) for *sua sponte* dismissals, this difference must be taken into account.

Brandon v. Dist. of Columbia Bd. of Parole, 734 F.2d 56, 59 (D.C.Cir.1984), *cert. denied*, 469 U.S. 1127 (1985).

[6] Thus, in *Franklin* we held that pro se prisoner complaints may be dismissed on the court's own motion and prior to service, but only in limited circumstances; a district court may not dismiss an in forma pauperis complaint unless it has no "arguable substance in law [or] fact." *Franklin*, 745 F.2d at 1227 (adopting standard in *Watson v. Ault*, 525 F.2d 886, 892 (5th Cir.1976)). *See also Brandon*, 734 F.2d at 59 (claim not viable); *Crisafi v. Holland*, 655 F.2d 1305, 1307-08 (D.C.Cir.1981) (no suggestion of supporting facts); *Munz v. Parr*, 758 F.2d 1254, 1258 (8th Cir.1985) (face of complaint shows "insuperable bar to relief") (quoting *Jackson Sawmill Co. v. United States*, 580 F.2d 302, 306 (8th Cir.1978), *cert. denied*, 439 U.S. 1070 (1979)).

We have recognized several possible bases which may justify a district court's decision to dismiss an in

forma pauperis complaint as having no arguable substance in law or fact. First, a court may dismiss as frivolous complaints that recite bare legal conclusions without any supporting fact. *Franklin*, 745 F.2d at 1228. *See Tripati v. First Nat'l Bank & Trust*, 821 F.2d 1368, 1370 (9th Cir.1987).

Second, a court may dismiss if the plaintiff's claims are redundant or barred by res judicata because of previous litigation. *Tripati*, 821 F.2d at 1370. *See Van Meter v. Morgan*, 518 F.2d 366, 368 (8th Cir.), *cert. denied*, 423 U.S. 896 (1975). The district court may review its own records to determine whether, given previous court documents, the plaintiff's claims are redundant. *Stiltner v. Rhay*, 322 F.2d 314, 316 (9th Cir.1963), *cert. denied*, 376 U.S. 920 (1964).

Third, we have observed that "[a]n action may be dismissed under section 1915(d) where the defense is complete and obvious from the face of the pleadings or the court's own records." *Franklin*, 745 F.2d 1221, 1228.

Fourth, a court may dismiss a claim that is founded on "wholly fanciful" factual allegations. *Id.* It appears that the district court viewed the rape allegations in this case as fanciful because it did not believe so many similar episodes could have occurred. However, the district court could not properly assess the credibility of the plaintiff's allegations, for we expressly rejected a standard of frivolousness which permitted the exercise of credibility discretion. *Id.*

[7] In section 1915(d) dismissal of actions as "wholly fanciful," we must accordingly look to a standard which prevents dismissal on grounds of a credibility assessment. Such a standard is found in the principles of judicial notice. Indeed, in authorizing dismissal of complaints founded on "wholly fanciful" factual allegations in *Franklin*, we relied upon quoted authority in two other circuits applying a judicial notice standard in assessing "fanciful" allegations:

> A court may dismiss as frivolous complaints reciting bare legal conclusions with no suggestion of supporting facts, or postulating events and circumstances of a wholly fanciful kind. Similarly, "[a] complaint conflicting with facts of which the district court may take judicial notice might also properly be dismissed under section 1915(d)." *Taylor v. Gibson*, 529 F.2d 709, 717 (5th Cir.1976).

Id. (quoting *Crisafi v. Holland*, 655 F.2d 1305, 1307-08 (D.C.Cir.1981)). We therefore hold that a court may dismiss an action as frivolous if it is dependent upon allegations which conflict with facts of which a district court may take judicial notice.

The category of facts of which a district court may take judicial notice is a very narrow one; a judicially noticeable fact is one not subject to reasonable dispute because it is "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed.R.Evid. 201. *See* E. Cleary,

McCormick's Handbook of the Law of Evidence § 329-30 (2d ed. 1972). Such a narrow standard is required if courts are to make state officials accountable for meritorious prisoner claims of constitutional violations. *See, e.g., Estelle v. Gamble*, 429 U.S. 97 (1976), *reh'g denied*, 429 U.S. 1066 (1977). It is also necessary in order to avoid the waste caused by premature dismissals resulting in appeals and remand before consideration of defendant's answer.

> Admittedly, it is tempting to eliminate the meritless complaint at the pleading stage. Unfortunately, [however], this "is another instance of judicial haste which in the long run makes waste," *Dioguardi v. Durning*, 139 F.2d 774, 775 (C.A. 2 1944)(Clark, J.) (citation omitted).

Estelle, 429 U.S. at 112-13 (Stevens, J., dissenting). *See Sherman v. Yakahi*, 549 F.2d 1287, 1290 n. 5 (9th Cir.1977) quoting Justice Stevens); *Brandon*, 734 F.2d at 62; *Munz*, 758 F.2d at 1258. Only if the facts alleged are impossible in light of any judicially noticeable fact may the district court find a complaint "wholly fanciful" and hence without arguable substance in law or fact.

The facts alleged here are not of that nature. Appellant alleged homosexual rapes committed between July, 1982 and December, 1984 by various prison officials and inmates at both Folsom Prison and the California Medical Facility at Vacaville. He alleges rape because of evidence of needle marks on his arms in the mornings,

leading him to believe he had been drugged, feces on his undergarments and skin problems.

The magistrate and district court considered appellant's homosexual rape claims frivolous because appellant's five complaints alleged rapes over a period of 2 years, by various persons with similar modus operandi. It is hard to believe so many similar incidents occurred. But we cannot take judicial notice that none of them occurred. There is no indisputable source to tell us they did not happen. *See* Fed.R.Evid. 201. By determining the frivolousness of all of appellant's complaints as a group, the district court relied upon an improper determination by the magistrate that appellant's claims were not credible. This is not permissible. *Franklin*, 745 F.2d at 1228. The magistrate himself stated that "although each complaint, taken separately, is not necessarily frivolous, a different picture emerges from a reading of all five complaints together."

If the district court had reviewed appellant's complaints individually and had treated the factual allegations as presumptively truthful, it could not have dismissed them as frivolous because they are not "wholly fanciful"; appellant's allegations of needle marks on his arms and other evidence of homosexual rape present claims with an arguable basis in fact.

We affirm the district court's dismissal of appellant's procedural due process claim and his eighth amendment claim based on deprivation of a mattress. However, we reverse the district court's dismissal of the remaining

eighth amendment claims because the district court never addressed them and never offered the appellant a chance to correct deficiencies through amendment. We reverse the district court's decision on the rape claims as well, because the dismissal was based upon credibility determinations impermissible under section 1915(d).

REVERSED AND REMANDED.

WALLACE, Circuit Judge, concurring:

I concur in Judge Schroeder's opinion insofar as it reverses the district court's dismissal of Hernandez's claims based upon alleged deprivation of footwear, rape, and other physical abuse. Under the controlling precedent of this circuit, *Noll v. Carlson*, 809 F.2d 1446 (9th Cir.1987), unless it is "absolutely clear" that a pro se civil rights plaintiff's complaint could not be amended to allege constitutional violations, the district court errs by dismissing the action without notifying the plaintiff of the complaint's deficiencies and allowing him leave to amend. *Id.* at 1449. Here, as in *Noll*, Hernandez amended his complaint, but did so without the benefit of a statement by the court notifying him of the deficiencies in his pleadings. *Id.* The magistrate's recommendations to the district court, which erroneously concluded that Hernandez's allegations were "wholly fanciful" because unlikely, did not serve as adequate notice of the complaint's deficiencies under *Noll*. Thus, while I agree with Judge Aldisert that Hernandez's various complaints failed to state claims upon which relief could be granted,

see Aldisert, J., dissenting, reversal is required under *Noll* to allow Hernandez a chance to remedy the deficiencies in his complaint.

As Judge Aldisert points out in his persuasive dissent, it is not enough for a complaint to allege conclusions that are merely "possible"; a plaintiff must allege facts from which the liability of each defendant can rationally be inferred. I agree with Judge Schroeder that Hernandez should be allowed to amend his complaints, if he can, to add allegations that will establish the connection of each defendant to the deprivations claimed by Hernandez and that will establish that Hernandez has been the victim of unconstitutional conduct, rather than mere negligence. However, I write separately to emphasize that, should Hernandez fail to remedy the problems in his complaints after being informed of their deficiencies, his claims properly may be dismissed as frivolous for the reasons stated in Judge Aldisert's dissent.

ALDISERT, Circuit Judge, concurring and dissenting:

When Mr. Monroe and his family were routed out of bed in the middle of the night by the Chicago police, and made to stand naked in their living room while the cops ransacked every room in their home, emptying drawers and ripping mattress covers, the Supreme Court took long overdue action. In *Monroe v. Pape*, 365 U.S. 167 (1961), the Court resuscitated, if not resurrected, the remedy of the Civil Rights Act of 1874, the now familiar

42 U.S.C. § 1983. Since that day, this federal remedial statute has been successfully utilized to correct tens of thousands of civil rights violations of all description, in high school classrooms to maximum security wings of state prisons.

Section 1983 has been a major force in protecting the individual from countless abuses by the city, county, and state. We have become a more civilized society because of the protections it affords those under police arrest or confined to penal institutions. Thanks to section 1983, and concurrent prison reforms, we no longer tolerate the degrading experiences portrayed in film classics such as Paul Muni's powerful role as Burns in "*I Was a Fugitive from a Georgia Chain Gang,*" or Paul Newman's portrayal of "*Cool Hand Luke.*" Nor do we tolerate the dehumanizing treatment that once existed in prisons, where an inmate was denuded of his dignity, stripped of his name, addressed by only an identification number, and constantly ran the risk of being brutally beaten or tossed into "the hole" indefinitely, at the sole whim of a prison guard.

It is with sympathy for the conditions of prison inmates, enthusiastic endorsement of the massive protection now extended to state prisoners by the filing or threat of filing of civil rights actions, and the profound sensitivity that must be extended to *pro se* petitions for relief, that I review the district court's dismissal of Mike Hernandez' complaints.

I join Judge Schroeder's opinion to the extent that it affirms the district court's dismissal of the procedural due process claim and the eighth amendment claim based on deprivation of a mattress. I do not agree with the majority's analysis of the other claims set forth by Judges Wallace and Schroeder. I would affirm the judgment of the district court in all respects, for reasons other than those given by the district court.

Let it be understood at the outset that what divides this panel on the remaining claims is a very narrow issue. I do not read my colleagues' opinions as deciding that the plaintiff's many claims can, at this time, pass muster when measured against standards of frivolousness. I think the entire panel is unanimous in this respect. What divides us is that my colleagues seem to feel Hernandez was entitled to a *second* notice that his complaints were to be dismissed, and that, somehow, he can amend his complaints again (all three complaints have been amended at least once), and make factual averments sufficient to permit him to mount the hurdle of frivolity.

Thus, we disagree only on procedure. Because Hernandez' complaints are already fact-specific, setting forth a complete narrative of that which occurred first at Folsom prison and later at Vacaville, I believe that no amendment of facts can save the fatal deficiencies that permeate all his liability claims against the named defendants. The necessary factual predicate that forms the major premise of his legal arguments can in no way be enlarged or altered to support a possible, let alone reasonable, inference of liability.

I.

Where a complaint fails to state a claim on which relief can be granted, there are two levels in the preliminary proceedings at which the complaint may be dismissed. The first is under the authority of 28 U.S.C. § 1915(d), even prior to service of the complaint upon the defendant. *Franklin v. Murphy*, 745 F.2d 1221, 1226 (9th Cir. 1984) (*Franklin*). Under section 1915(d), the court may dismiss the case if satisfied that the action is frivolous. After service upon the defendant, the court may grant a motion for dismissal under Rule 12(b)(6), F.R.Civ.P.

The district court dismissed Hernandez' rape allegations as frivolous, basing its judgment on the recommendation of a magistrate. The magistrate decided that each complaint, when read independently of the other complaints filed by Hernandez, "is not necessarily frivolous," ER 34 at 5, but that "a different picture emerges from a reading of all five complaints together." *Id.* The magistrate relied on the test for frivolity set out in *Franklin*—specifically, that the concept of frivolous embraces complaints "postulating events and circumstances of a wholly fanciful kind." *Franklin*, 745 F.2d at 1228 (quoting *Crisafi v. Holland*, 655 F.2d 1305, 1308 (D.C.Cir. 1981) (per curiam)). The magistrate found Hernandez' rape allegations "wholly fanciful" because they were reiterated in several different complaints alleging the same "modus operandi," but involved different prison officials and inmates at different institutions.

Like my colleagues, I would not accept the reasoning of the magistrate adopted by the district court, for under the circumstances of this case, that would amount to making credibility findings on the pleadings. As Judge Schroeder correctly points out, in a section 1915(d) adjudication, we must assume the credibility of the plaintiff's allegations unless they run counter to law, human behavior, or permissible inferences.

I would affirm the district court's dismissal for entirely different reasons, a practice permitted in this Circuit. *Hatch v. Reliance Ins. Co.*, 758 F.2d 409 (9th Cir.1985); *Salmeron v. United States*, 724 F.2d 1357, 1364 (9th Cir.1983); *Angle v. United States*, 709 F.2d 570, 573 (9th Cir.1983). I would hold that even if we credited every factual allegation in Hernandez' complaints, the complaints are frivolous and no opportunity to amend can possibly cure that deficiency.

In each of the complaints at issue in the three appeals before us, Hernandez included a very detailed statement of facts. These facts, if believed, do not make out a claim "on the basis of reasonable inferences and not mere speculation." *Edward J. Sweeney & Sons, Inc. v. Texaco*, 637 F.2d 105, 111 (3d Cir.1980).

The district court's dismissal of the complaints as frivolous is subject to *de novo* review by this court. *Tripati v. First Nat'l Bank & Trust*, 821 F.2d 1368, 1369 (9th Cir.1987); *Rizzo v. Dawson*, 778 F.2d 527, 530 (9th Cir.1985). Our role here is to determine whether, as a

matter of law, the claims are critically deficient of the minimum quantum of fact, reason, and law from which the plaintiff might possibly be entitled to relief. In exercising this review, I proceed on the assumption that "plaintiff's sworn allegations are . . . uncontroverted and entitled to the usual presumption of truth." *Franklin*, 745 F.2d at 1228.

My ultimate conclusion is that the multitude of allegations expressed in the separate complaints filed in the district court do not qualify for further consideration. I agree with the district court's conclusion that the allegations are frivolous and therefore should be dismissed under 28 U.S.C. § 1915(d).

II.

My point of beginning is a discussion of how the courts have interpreted the statutory term "frivolous." "The court may dismiss the case . . . if satisfied that the action is frivolous or malicious." 28 U.S.C. § 1915(d). The most familiar court definition of frivolous, that in *Anders v. California*, 386 U.S. 738 (1967), is phrased in the negative. *Anders* states that a contention is not frivolous if "any of the legal points [are] arguable on their merits." *Id.* at 744. In *Franklin*, this court determined that an action is frivolous if it lacks "arguable substance in law and fact." *Franklin*, 745 F.2d at 1227. This Circuit has accepted the frivolity analysis formulated by the Court of Appeals for the D.C. Circuit:

> "A court may dismiss as frivolous complaints reciting bare legal conclusions with no suggestion of supporting facts, or postulating events and circumstances of a wholly fanciful kind. Similarly, 'a complaint conflicting with facts of which the district court may take judicial notice might also properly be dismissed under section 1915(d).' *Taylor v. Gibson*, 529 F.2d 709, 717 (5th Cir.1976)."

Id. at 1228 (quoting *Crisafi v. Holland*, 655 F.2d 1305, 1307-08 (D.C.Cir.1981) (per curiam)).

This analysis sets out *three* possible standards for dismissing a complaint as frivolous: 1) does the complaint recite bare legal conclusions without supporting facts? 2) does the complaint postulate wholly fanciful events or circumstances? 3) does the complaint conflict with facts of which a court may take judicial notice? (A fourth standard—redundancy—was added by *Tripati v. First Nat'l Bank & Trust*, 821 F.2d 1368, 1370 (9th Cir.1987)). Judge Schroeder combines the second and third *Franklin* standards. She sees the "judicial notice" and the "wholly fanciful" tests as being one in the same. *See* Schroeder op. at 14465 ("Only if the facts alleged are impossible in light of any judicially noticeable fact may the district court find a complaint 'wholly fanciful' and hence without arguable substance in law or fact.")

As I read *Franklin*, the "wholly fanciful" and "judicial notice" standards are two separate possible bases for dismissing a complaint as frivolous. Under *Franklin*, a

court may indeed dismiss an action as frivolous if it is "dependent upon allegations which conflict with facts of which a district court may take judicial notice." Schroeder op. at 14464. However, a court may *also* dismiss as frivolous an action "postulating events or circumstances of a wholly fanciful kind." *Franklin* at 1228. I find Hernandez' allegations to be indisputably wholly fanciful.

"Frivolous," which *Webster's Third New International* defines as "of little weight or importance: having no basis in law of fact," is derived from the Latin "friuolus," which meant "worthless, trashy, insignificant, trifling, silly and empty." I believe that Hernandez' complaint comes within either the English or Latin definitions established.

I turn now to the procedures utilized in the federal courts in handling prisoner civil rights cases, and the relationship of those procedures to the determination of frivolity.

III.

As Judge Schroeder notes, this court has adopted the recommendations of the Prisoner Civil Rights Committee of the Federal Judicial Center (the Committee) relating to section 1915(d) cases:

> [The Committee] recommends that the court make the frivolity determination before issuing process to protect defendants from the expense and inconvenience of answering a frivolous complaint. Federal Judicial Center, *Recommended Procedures for Handling Prisoner Civil Rights Cases in the Federal Courts* 59 (1980).
>
> . . .
>
> We find persuasive the reasoning of the cases holding that courts may dismiss frivolous actions filed in forma pauperis before service of process and adopt the procedure recommended by the Federal Judicial Center and applied here by the district court.

Franklin, 745 F.2d at 1226-27.

Because I served as the Federal Judicial Center Committee's chair, reference to the reasoning that undergirded the Committee's efforts to guide federal courts in the use of section 1915(d) may be of some help. I begin with a statement of the Committee's purposes:

> First, to evaluate the handling of prisoner conditions-of-confinement cases with the purpose of recommending such changes as are desirable to increase the capacity to give prompt relief to meritorious prisoner cases.
>
> Second, to help federal judges, magistrates, and staff personnel deal effectively and efficiently with these difficult-to-handle cases.

The Federal Judicial Center, *Recommended Procedures for Handling Prisoner Civil Rights Cases in the Federal Courts* xi (1980) [hereinafter "Report"]. The polestar that guided the Committee's deliberations and hearings was to devise methods to preserve meritorious cases when faced with the statistical reality that most prisoner civil rights complaints are totally devoid of merit:

> It is generally agreed that most prisoner rights cases are frivolous and ought to be dismissed under even the most liberal definition of frivolity. The Freund Report [named after Professor Paul Freund of Harvard who chaired the Study Group on the Caseload of the Supreme Court, 57 F.R.D. 573 (1972)] concluded that: "The number of these petitions found to have merit is very small, both proportionately and absolutely." In fiscal year 1979, 9,943 of 10,301 or 96.5 percent of § 1983 cases terminated in federal court were dismissed or otherwise concluded prior to trial.

Report at 9-10 (footnotes omitted).

To understand the complex problems facing the federal judiciary today in this area, one must look at the crushing avalanche of *pro se* prisoner petitions that inundate our court system. No other judicial system in the world is exposed to this phenomenon, because all other systems require that court pleadings be filed by counsel. Recording the experience of only the past 20 years, we can note both the increasing number of prisoner

civil rights actions filed and the minuscule percentage of those cases that reach trial:

Year	*Prisoner Civil Rights Cases*	*Percentage Reaching Trial*
1968	1,369	2.3
1969	1,631	2.6
1970	2,144	2.4
1971	2,260	3.3
1972	2,877	3.4
1973	3,500	4.9
1974	4,159	5.3
1975	5,033	5.8
1976	5,858	4.4
1977	6,679	5.6
1978	8,883	4.6
1979	10,301	3.5
1980	10,807	2.3
1981	13,248	4.4
1982	14,187	4.9
1983	16,434	4.8
1984	17,437	5.1
1985	17,271	4.0
1986	19,304	4.4
1987	22,127	3.9

Table C.4, Annual Reports of the Director of the Administrative Office of the United States Courts (1968-1987). As of June 30, 1987, there were 2,825 prisoner civil rights cases pending in the district courts of the Ninth Circuit, *id.*, Table C.3A (1987), and 2,765 such cases had

been terminated during the court year. *Id.*, Table C.3B (1987). Thus, in a 20-year period the cases have increased from 1,369 a year to 22,127, an ominous 1600 percent, and this Circuit has borne its proportionate share of the stress.

A.

Tnis being so, we must bade fealty to three important goals: we must ensure that meritorious prisoner civil rights cases do not fall between the cracks. The "cry wolf!" syndrome can affect federal judges, especially district judges and magistrates, with what we may describe as a kind of jurisprudential weariness or fatigue, akin to what the Germans call *Weltschmerz*, that sets in from examining countless meritless petitions. At the same time, we must "protect defendants from the expense and inconvenience of answering a frivolous complaint." *Franklin*, 745 F.2d at 1226. Above all, we must respect our obligation to the federal judiciary to provide equal justice to all who seek relief in the federal courts and to ensure the maximum delivery of legal services to all litigants—*pro se* as well as those represented by counsel.

In 1980, when the case load was only half that of today, the Committee attempted to resolve these tensions by recommending that in prisoner civil rights complaints the plaintiff go beyond the requirement of ordinary notice pleading. The Committee would require the plaintiff to set forth the facts supporting his claim. Admittedly, this is a departure from the notice pleading requirement set

forth in Rule 8, F.R.Civ.P., but the Committee reasoned that Rule 8 and other pleading rules were designed for cases in which the plaintiff was represented by counsel. This exception for *pro se* prisoner complaints was designed to assist the prisoner in setting forth at the earliest possible moment the facts that formed the basis of his complaint so that the claim could be properly evaluated. The Committee also reasoned that this would encourage the prisoner *pro se* plaintiff to tell his or her story without fear of being injured in the pleading process by not conforming to the niceties of pleading rules that were designed for the use and comprehension of persons learned in the law. Because in virtually all prisoner civil rights cases the plaintiff is *pro se*, we suggested Federal Judicial Center Form 1, which is now distributed to all federal district court clerk offices and to most state correctional institutions for use by inmates. Paragraph IV of Form 1 clearly instructs the plaintiff:

> Statement of Claim
>
> [State here as briefly as possible the *facts* of your case. Describe how each defendant is involved. Include also the names of other persons involved, dates, and places. Do not give any legal arguments or cite any cases or statutes. If you intend to allege a number of related claims, number and set forth each claim in a separate paragraph. Use as much space as you need. Attach extra sheet if necessary.]

Report at 92. The Eastern District of California, from which this appeal arises, utilizes this form. *See, e.g.*, Civ. S-84-1074-LKK. Indeed, the clerks in every district court within this circuit probably utilize the form. To assist inmates in preparing complaints, our Committee recommended that the form also be distributed to major penal institutions. The use of the form is widespread nationally and seems to be uniformly well received.

B.

The Committee also gave serious attention and detail study to the question of dismissing complaints under section 1915(d):

> Where a complaint fails to state a claim for which relief may be granted *and for which no amendment can properly state such a claim*, there are two levels in the preliminary proceedings where the complaint may be dismissed. The first may be under the authority of 28 U.S.C. § 1915(d) even prior to service of the complaint upon the defendant. After service upon the defendant, the court may entertain a motion for dismissal under Rule 12(b)(6).

Report at 63 (emphasis added). The Committee recommended "dismissal with no opportunity to respond when the complaint is irreparably frivolous or malicious." *Id.* at 60, citing *Worley v. California Dep't of Corrections*, 432 F.2d 769, 770 (9th Cir. 1970) (no claim was stated

and there was no deficiency in the allegations that could be overcome by amendment). In this respect, the Committee accepted Judge Hamley's 1965 statement that a district judge may dismiss a prisoner's civil rights complaint without opportunity to amend where "it clearly appears from the complaint that the deficiency cannot be overcome by amendment." *Armstrong v. Rushing*, 352 F.2d 836, 837 (9th Cir.1965). This rule was restated in *Potter v. McCall*, 433 F.2d 1087, 1088 (9th Cir.1970). It has continued to be the rule in this Circuit. *Noll v. Carlson*, 809 F.2d 1446, 1448 (9th Cir.1987); *Broughton v. Cutter Labs.*, 622 F.2d 458, 460 (9th Cir.1980).

It is on this narrow ground that my colleagues and I part company in all three appeals. They require the district judge to give additional notice of his intention to dismiss and advise the plaintiff of his right to amend his complaint once again. I take the position that (1) the plaintiff already had notice of the court's intention to dismiss—he was served with a copy of the magistrate's findings and recommendations of dismissal under section 1915(d), to which he filed exceptions, and (2) given the specific nature of the plaintiff's theories of liability, the factual deficiencies in his complaints "cannot be overcome by amendment." *Noll*, 809 F.2d at 1448; *Potter*, 433 F.2d at 1088; *Armstrong*, 352 F.2d at 837.

I will now address the specifics of Hernandez' complaints. In each of the complaints, Hernandez followed to the letter the Committee's recommended Form 1, provided by the Eastern District of California. In each complaint, he set forth a section captioned

"Statement of Facts." This point is critical. Hernandez did not rely on notice pleading in describing his claims.

IV.

These are excerpts from Hernandez' Statement of Facts in his complaint alleging sexual assault by prison guards at Folsom Prison:

> 1. Plaintiff alleges that he was sexually assaulted and raped by correctional officers in cell 1303, building 2, on the night of July 29, 1982, and during the early morning hours of July 30, 1982, during the first watch.
>
> 2. On the 30th day of July, 1982, plaintiff discovered evidence and signs of rape on his clothing, specifically a tee-shirt. On that same morning, on his way back from breakfast, to building 2, plaintiff overheard several correctional officers and inmates who work as tier tenders, taunting and ridiculing him. They were telling each other that plaintiff was getting raped in prison, and that plaintiff was raped the night before.
>
> 3. On or about the 5th day of August, 1982, plaintiff was interviewed. . . . At this interview, plaintiff complained to both Lieutenant Gonzalez and the other members of the committee that he had found signs and

> evidence of rape and sexual assault on his clothing. Plaintiff displayed his tee-shirt to the committee members, so they could see some feces stains. . . .
>
> 4. Plaintiff further alleges that normally he does not sleep as many hours as he had slept on the night of July 29, 1982, for on that specific night he went to sleep early, at approximately 8:00 P.M., and did not wake up until after ten (10) hours, the following morning, at approximately 6:00 A.M. Plaintiff normally sleeps five (5) hours without awakening, but on the night of July 29, 1982, he slept about twice as much as he normally sleeps.

ER 43 at 5-6.

In this complaint, Hernandez alleges a rape by unknown correctional officers on the basis of putative inferences only. There is no direct evidence that a rape occurred. Hernandez concludes he was raped because he found fecal stains on his teeshirt, slept later than usual, and received taunts from fellow inmates. He suggests that he could not have known about the actual victimizing of his body because he slept ten hours that night instead of his normal five. Thus, he would like us to draw two inferences: that he was drugged, and that because he was drugged, he was not aware he had been raped by unknown correctional officers.

A.

An inference is a process by which one proposition (a conclusion) is arrived at and affirmed on the basis of one or more other propositions, which are accepted as the starting point of the process. Stebbing suggest that an "[i]nference . . . may be defined as a mental process in which a thinker passes from the apprehension of something given, the datum, to something, the conclusion, related in a certain way to the datum, and accepted only because the datum has been accepted."* Whether an inference is deductive or inductive depends upon the nature of the relationship between the proposition that is given and the proposition that is inferred. Hernandez asks us to draw an inductive inference, a conclusion from a congeries of particulars. From the particular facts asserted in his complaint, he asks us to draw the conclusion by induction that the defendants can be held liable.

But whether an inference is valid, that is, whether the conclusion is sound and free from flaw, depends upon its logical force; the question of logical force is in turn based on the reasonableness of the conclusion requested to be drawn. Accordingly, inferences are permitted to be drawn in the law only to the extent that known human experience dictates that certain consequences can and do follow from basic circumstantial facts. What has been said in another context is relevant here:

*L. Stebbing, *A Modern Introduction to Logic* 211-212 (6th ed. 1947).

> The court's role is especially crucial when, as here, the plaintiff's case, and therefore the defendant's liability, is based solely on circumstantial evidence. The illegal action must be inferred from the facts shown at trial. Inferred factual conclusions based on circumstantial evidence are permitted only when, and to the extent that, human experience indicates a probability that certain consequences can and do follow from the basic circumstantial facts. The inferences that the court permits the jury to educe in a courtroom do not differ significantly from inferences that rational beings reach daily in informally accepting a probability or arriving at a conclusion when presented with some hard, or basic evidence. A court permits the jury to draw inferences because of this shared experience in human endeavors. *See generally*, McCormick, Handbook of the Law of Evidence 289-96 (2d edition 1972).

Edward J. Sweeney & Sons, Inc. v. Texaco, 637 F.2d 105, 116 (3d Cir. 1980). I conclude that, under the facts pleaded here, the allegations do not qualify as sound, valid inferences. The test for a permissible inference is not whether human experience indicates a remote *possibility* that a particular conclusion may be drawn. Rather, the test is probability: was it more probable than not that these consequences can and do follow from the narrative or historical facts. In my view, applying the most

generous of standards, the desired conclusion may not be drawn from the hard facts pleaded here. I further conclude that Hernandez can allege no other narrative *facts* by amendment that will permit that conclusion to be drawn.

B.

Even if we were to accept Hernandez' inference, that he was in fact the victim of a rape, that inference still does not point to the liability of the named defendants. The Civil Rights Act, under which this action was filed, provides:

> Every person who, under color of [state law] . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution . . . shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983.

The statute requires that there be an actual connection or link between the actions of the defendants and the deprivation alleged to have been suffered by the plaintiff. *See Monell v. Department of Social Servs.*, 436 U.S. 658, 692 (1978); *see also Rizzo v. Goode*, 423 U.S. 362 (1976). This court has held that "[a] person 'subjects' another to the deprivation of a constitutional right, within

the meaning of section 1983, if he does an affirmative act, participates in another's affirmative acts, or omits to perform an act which he is legally required to do that causes the deprivation of which complaint is made." *Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir.1978).

The law is clear that the liability of supervisory personnel must be based on more than merely their right to control others. *Monell, supra*, 436 U.S. at 694 n. 58. At a minimum, appellant is required to show a causal connection between the alleged harms suffered and appellees' actions. The appellees must be shown to be responsible for setting in motion a series of acts by others, which the appellees knew or reasonably should have known would cause the others to inflict constitutional injury upon the plaintiff. *Id.* 743-44.

> Conclusionary allegations, unsupported by facts, [will be] rejected as insufficient to state a claim under the Civil Rights Act. . . . The plaintiff must allege with at least some degree of particularity overt acts which defendants engaged in that support the plaintiff's claim.

Jones v. Community Dev. Agency, 733 F.2d 646, 649 (9th Cir.1984) (citations omitted).

The defendants are the Director of Corrections, the prison Superintendent, and members of the disciplinary and classification committees. The only "facts" supposedly establishing sexual assault were the discovery of feces on appellant's tee-shirt and ridicule by unidentified

correctional officers and inmates. No single fact whatsoever was alleged that would establish the personal involvement in any alleged rape of appellant by any of the defendants, either by way of personal participation or by way of knowledge of the participation of other inmates or correctional officers. Even if we credit every word of Hernandez' Statement of Facts, the allegations are insufficient to hold the defendants liable because they lack the quality of arguable merit.

C.

The fatality can be precisely stated: we can infer conclusions imposing liability on the basis of circumstantial evidence only when, and to the extent that, human experience indicates a probability that certain consequences can and do follow from basic circumstantial facts. The basic relevant circumstantial facts here—sleeping late and finding fecal stains on a tee-shirt—cannot reasonably lead to the conclusion that the appellees were responsible for the alleged violations. This is fatal to Hernandez' case and no amendment can bring it back to life. No amended statement can establish a causal connection between the alleged harms suffered and appellees' actions.

V.

We now turn to the Folsom Prison eighth amendment claims:

14. Plaintiff alleges that he was placed in cell 812 in the security housing unit, and was forced to sleep on a sheet metal bunk without a mattress, for one night. Plaintiff was forced to borrow one blanket from inmate Raymond Rodriguez, who was housed in the cell next to his cell. Plaintiff was subjected to very uncomfortable bedding and suffered from freezing weather conditions, as he was housed in a cell, located across from broken windows.

15. Plaintiff alleges that he was denied footwear, because no officer in the security housing unit issued him a pair of shoes to wear after he was brought from the psychiatric ward; he was forced to go about without shoes for approximately thirty (30) days.

ER 43 at 8.

The eighth amendment proscribes "cruel and unusual punishments." U.S. Const. amend. viii. This proscription embodies "broad and idealistic concepts of dignity, civilized standards, humanity, and decency," *Jackson v. Bishop*, 404 F.2d 571, 579 (8th Cir.1968), against which we must evaluate penal treatment. The amendment draws its meaning from "the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958). Conduct and punishments which are incompatible with those standards, or which "involve the unnecessary and wanton infliction of pain," are prohibited. *Estelle v. Gamble*, 429 U.S. 97, 102-03 (1976).

Measured against these concepts, sleeping in a bunk without a mattress for one night cannot possibly rise to the dignity of an eighth amendment deprivation. Here the majority and I agree. But I disagree with Judge Schroeder's description of the facts pleaded by Hernandez on the blanket claim: "Appellant alleges that he slept without a blanket for an unspecified amount of time in a room across from broken windows." Judge Schroeder's opinion transcript at 14459. Judge Schroeder's characterization of Hernandez' factual pleading has no support whatsoever in the complaint. Rather, as indicated above, all Hernandez alleged was that he "was forced to borrow one blanket from Raymond Rodriguez, who was housed in the cell next to his cell." This certainly does not qualify as an eighth amendment deprivation. Even if we assume that going without shoes for 30 days involves "the unnecessary and wanton infliction of pain," Hernandez' allegation that an officer in the security housing unit failed to issue him a pair of shoes does not rise to a colorable claim against the defendants named here, because no one of those defendants was alleged to be the officer distributing the shoes.

Under *Rizzo v. Goode*, 423 U.S. 362 (1976), and *Department of Social Servs. v. Monell*, 436 U.S. 658 (1978), the mere right to control others, without any control or direction having been exercised, and without any failure to supervise, is not enough to support section 1983 liability. Accordingly, I believe that this eighth amendment contention is controlled by the important precept set forth in *May v. Enomoto*, 633 F.2d 164 (9th Cir.1980), to wit,

that under the Civil Rights Act, a defendant cannot be charged with responsibility for neglectful acts of subordinates, absent that defendant's direction or participation. *Id*. at 167. The Civil Rights Act does not permit liability under respondeat superior. *See Monell*, 436 U.S. at 694.

I would affirm the district court's dismissal of these claims. Although neither the magistrate nor the district judge discussed them in the written recommendations or in the opinion, it cannot be said that the district court disregarded these questions. The entire complaint was dismissed; the complaint included paragraphs 14 and 15; therefore, there can be no question that these allegations were dismissed. As a reviewing court, we are in the same position as a district court to test these contentions to determine whether they have arguable merit. In my view, they do not.

VI.

I turn now to the first Vacaville case. In his recommendations, the magistrate referred to the facts Hernandez would have alleged had he been permitted to amend his complaint. *See* ER 21 at 4. The district court adopted the magistrate's findings and recommendations. I, too, shall proceed as if the proposed amended complaint were here before me:

> 1. On or about the 29th day of July, 1983, plaintiff alleges that he was ordered to move out of cell L-361, L-wing, unit IV, on the third

floor, into the N-2 wing dorm, by Correctional Sergeant Anderson.

5. Plaintiff alleges that on the 30th day of July, 1983, he filed an inmate/parolee appeal form (602) with defendant Hartman's and defendant Ingle's office, wherein plaintiff complained about housing conditions and also claimed that he had found signs and evidence of sexual assault and rape on his clothing, and that he believed one or more inmates housed in the same dorm as him, assaulted and raped him on the night of July 29, 1983. . . .

6. Subsequently, plaintiff alleges that he discovered four needle puncture wounds on different parts of his body: on the 2nd day of August, 1983, plaintiff displayed one needle wound on his right wrist to defendant Ingle; on the 3rd day of August, 1983, plaintiff displayed the same needle wound to his supervisor, at the law library, and two more needle wounds plaintiff had discovered on the calf of each leg; on the 6th day of August, 1983, plaintiff discovered a fourth needle wound on his left wrist, and displayed this needle wound to Officer Kreger, the N-2 wing dorm officer on the second watch, on the same day plaintiff was given permission to move out of the N-2 wing dorm and into a single-man cell in the same wing.

9. All the events described in paragraph five (5) were witnessed by inmate Harold Pierce; his affidavit is attached to this amended pleading as Exhibit G. (Exhibit G reads: "Harold Pierce hereby declares: . . . On the night of July 29, 1983, I witnessed inmate Dushane B-71187 and inmate Milliard B-30802 assault and rape inmate Mike Hernandez as he lay asleep in bed 206 in the N-2 unit dorm.")

15. Plaintiff alleges that on or about the 15th and 16th days of December, 1983, he found signs and evidence of rape and sexual assault on his clothing and reported it to Officer B. Da Rosa on December 17, 1983. . . .

ER 11 at 3-6.

The foregoing facts, if believed, do not make out a valid constitutional claim against the prison official defendants under either the due process clause or the eighth amendment. Again, Hernandez offers no direct evidence that he was raped. He relies only on the suggestion that somehow he was drugged and then raped while asleep. His only effective evidence is the affidavit of Harold Pierce describing events allegedly occurring on the night of July 29, 1983. That affidavit may have been sufficient to establish a state tort claim against inmates Dushane and Milliard, but it is insufficient to establish that the named defendants knew or should have known of these events and taken steps to prevent them. *See Procunier v. Navarette*, 434 U.S. 555, 562 (1978); *May v.*

Enomoto, 633 F.2d 164, 167 (9th Cir.1980); *Johnson v. Duffy*, 588 F.2d 740, 745 (9th Cir. 1978).

VII.

The remaining appeal also involves events at Vacaville. In this complaint, appellant alleged he was raped as follows:

1. During the night of January 12-13, 1984, by defendant McIntyre and two inmates, based on needle marks;

2. During the night of January 26-27, 1984, also by McIntyre and two inmates, based on needle marks;

3. During the night of March 22-23, 1984, by unknown persons but believed to be defendant Perdoni, based on finding needle marks on his right wrist on the morning of March 23;

4. During the night of June 28-29, 1984, by unknown persons but believed to be defendant Perdoni, based on finding needle marks on his left arm, right wrist and right ankle on the morning of June 29;

5. On August 4 and August 23, 1984, during the 1:00 P.M.-3:00 P.M. watch, believed to be by defendant Perdoni, based on appellant's discovery of needle marks;

6. On September 11, 1984, during the 1:00 P.M.-3:00 P.M. watch, by defendants Fitzgerald and Price, based on discovery of a needle mark on his left thumb;

7. On September 16, 1984, during the 1:30 P.M.-3:00 P.M., watch, by defendant Price, based on discovery of needle marks on his left arm and right wrist;

8. On September 21, 1984, shortly before 7:00 A.M. by defendants Perdoni and/or McIntyre, based on awakening feeling ill and nauseous and discovering needle marks on his abdomen.

9. During the night of September 26-27, 1984, by defendant McIntyre, based on awakening to discover needle marks on his left arm and abdomen;

10. On October 8, 1984, by defendant McIntyre, based on awakening to discover a needle mark on his right arm.

11. During the night of October 26-27 or 27-28, 1984, by defendant McIntyre, based on awakening on October 28 to discover needle marks on his left arm and abdomen;

12. During the night of November 22-23 or 23-24, 1984, by defendant McIntyre, based on

awakening on November 25 to discover three needle marks on his left wrist;

13. During the early morning of December 5, 1984, by defendant Tomlinson, based on awakening to discover needle marks on his left arm;

14. During the early morning hours of December 9, 1984, by defendant Tomlinson, based on awakening to discover needle marks on his left wrist and right leg; and,

15. During the early morning hours of December 10, 1984, by defendant McIntyre, based on awakening to discover a needle mark on his right arm.

Appellant also alleged that as a result of these various sexual assaults and drug injections, he suffered fevers, bacteriological skin infections, headaches, nausea, sinus infections and facial scarring, and that institutional physicians refused his request for antibiotic medication.

A.

To place this appeal in perspective, it is helpful at this point to summarize the other two appeals before us. In appeal No. 86-2139, in his *amended* complaint, Hernandez said he had been raped by correctional officers at Folsom Prison on July 29, 1982. He reached this conclusion in the hypothesis that he found "signs of rape"

on his tee-shirt, to wit, fecal stains, and that on the morning of July 30, 1982, he was ridiculed by unidentified correctional officers and inmates about having been raped the night before. He had no personal recollection of having been raped and made no identification of his supposed rapist. In appeal No. 87-1693, his *proposed amended* complaint contends that he was again raped—this time at Vacaville—*on precisely the same day of the year as the Folsom rape, but one year later, on July 29, 1983*. Again, he concluded that he had been raped because he found "evidence" of sexual assault on his clothing, *viz*, feces and semen stains on his shirts. He also claimed that he found a needle wound on his right wrist on August 2, 1983; two needle wounds, one on each of his two legs, on August 3, 1983; and another needle wound on August 6, 1983. This time he alleged that his rapists were inmates, not correctional officers. Here, too, he had no personal knowledge of having been raped and made to identification of his alleged rapists.

B.

I now turn to an analysis of the massive complaint involving events at Vacaville in 1984. Here, Hernandez alleged that he had been raped 21, repeat 21, times. Hernandez named the Superintendent of the California Medical Facility at Vacaville, a correctional lieutenant, and six correctional officers as defendants. Of the alleged 21 acts of rape, four were allegedly committed by inmates. Although Correctional Officers McIntyre supposedly committed nine of these rapes, appellant's complaint contains no fact capable of establishing that McIntyre,

directly or by inference, or any of the other defendants, assaulted him. Here, too, he has no personal recollection of having experienced these savage assaults. His conclusions are based solely on the alleged discovery of needle punctures on his body. After these repeated acts, he complained he suffered only bacteria and acne on his face.

Irrespective of the outcome of this litigation, it must be acknowledged that Hernandez has established a world record capable of qualifying for the Guinness Book of Records: the only person who has been raped 28 separate time without knowing at the time that this was happening to him. Suffice it to say, as an experienced student and researcher in prisoner civil rights petitions, I believe that these three appeals go beyond the pale of frivolity. They are sheer and utter nonsense. They can be understood only by realizing that the appellant was diagnosed at Folsom Prison as an inmate requiring psychiatric treatment, that he was ordered transferred for this purpose, and that at the time of these appeals he is a patient at the Atascadero State Hospital. *See* ER, cover page.

VIII.

Even assuming appellant's rape fantasy had some basis in rationality, his complaints are utterly devoid of any allegations establishing the personal involvement of any of the defendants. His contentions depend upon the following prosyllogisms and episyllogisms:

A.

Major Premise: Some needle marks are signs of drug injection.
Minor Premise: I awoke with some needle marks.
Conclusion: Therefore, I was drugged.

B.

Major Premise: One who is drugged can be raped without his knowledge.
Minor Premise: I was drugged.
Conclusion: Therefore, I was raped.

C.

Major Premise: Those correctional officials who are involved or knowledgeable of inmate rapes are liable.
Minor Premise: Defendants are correctional officials.
Conclusion: Therefore, defendants are liable.

Both fallacies of form and material fallacies inhere in each of these three arguments. Rules of syllogistic logic, first identified by Aristotle, and universally acknowledged

by all logicians, are involved here.[1] Syllogism "A" represents the fallacy of the undistributed middle term:[2] In a formally valid categorical syllogisms, the middle term must be distributed in at least one of the premises. If either them minor term or the major term is distributed in the conclusion, it must be distributed in the premise in which it originates.[3] Here, the middle term "needle marks" is undistributed in both the major and minor premises. It does not necessarily follow that all needle marks are evidence of drug ingestion simply because *some* are. *See, e.g., Spencer v. Texas*, 385 U.S. 554, 569-570 (1967) (Warren, C.J., dissenting).

Syllogism "B" discloses the formal fallacy of the illicit major term. Here, the major term in the syllogism ("raped") is undistributed in major premise ("can be

---

1. *See* I. Copi, *Introduction to Logic* 201-02, 217-18 (7th ed.) (1986); J. Cooley, *A Primer of Formal Logic* 306 (1942); J. Creighton, *An Introduction to Logic* 139 (1958); R. Eaton, *General Logic* 95 (1931); W. Jevon, *Elementary Lessons in Logic* 127 (1965); L. Stebbing, *A Modern Introduction to Logic* 88 (1948).

2. Copi, *supra*, note 2, at 219-20. The three terms of the categorical syllogism are "middle," "major," and "minor." A term is "distributed" if it refers to the whole of its class; if it refers to only part of its class, it is "undistributed."

3. "For the two terms of the conclusion really to be connected through the third, at least one of them must be related to the *whole* of the class designation by the third or middle term." Copi, *supra* note 2, at 219.

raped"), but distributed in the conclusion ("was raped"). The resulting fallacy is obvious. Hundreds of physical or mental consequences can possibly follow injection or ingestion of drugs; being raped is only one possible consequence. Syllogism "C" violates a fundamental rule of categorical syllogisms: "A valid standard-form categorical syllogism must contain exactly three terms, each of which is used in the same sense throughout the argument." Copi, *supra*, at 217. In this case, the middle term, "correctional officials," is used in a different sense in the minor premise than it is in the major premise, where it refers to "correctional officials who are involved or knowledgeable of inmate rapes." This syllogism also exhibits the fallacy of the undistributed middle. The middle term, "those correctional officials who are involved or knowledgeable of inmate rapes" is undistributed in the major premise. The term "correctional officials" is also undistributed in the minor premise because it refers only to the defendant-correctional officials, not the entire universe of correctional officials.

But even if Hernandez' arguments met the requirements of formal logical form, they would still contain fatal defects. The arguments contain material fallacies, that is, errors or evasions that appear only through an analysis of meaning of the terms, rather than an analysis of the logical form. For example, each syllogism is a *non sequitur*, an argument exhibiting the lack of a logical connection. For the mix of pleaded facts—needle marks, fecal stains on a tee-shirt, sleeping later than usual on one occasion—any conclusion pinning liability on the defendants here is a paradigmatic *non*

sequitur. *See* materials collected in R. Aldisert, *The Judicial Process* 626-57 (1976).

IX.

At a very minimum, appellant is required to show a causal connection between the alleged harms suffered and the actions of the defendants. Hernandez' theory that he was raped is based only on the factual allegation that he discovered needle marks on his body the morning after the alleged incidents.

As a matter of law, the conclusion that he had been raped cannot be drawn as a permissible, let alone a reasonable, inference from the needle marks; a fortiori, the presence of the needle marks as a major premise cannot by any logical process lead to a conclusion implicating the named correctional officials as perpetrators of the rapes.

But what is of paramount importance here is that no amendment of facts in the complaint can cure this fatality given the theory advanced and the inferences required. This is a classic example of the precept set forth in the *Worley, Armstrong*, and *Noll* line of cases—if it clearly appears that the deficiency in the complaint cannot be overcome by amendment, the district court may dismiss under section 1915(d) without genuflecting to the needless ritual of giving the plaintiff the opportunity to amend a *second* time before entering an order of dismissal. This precept was reaffirmed as recently as April 26, 1988, by this court in *Albrecht v. Lund*, 845 F.2d 193, 195 (1988).

("If the district court determines that the 'allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency,' then the dismissal without leave to amend is proper.") (quoting *Schreiber Distrib. Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir. 1986)).

I would affirm the judgment of the district court in all respects for the reasons stated herein. The grand purpose of prisoner civil rights petitions under section 1983 is to insure that the structured society within penal institutions possesses the minimum accoutrements of civilized order. It is to eliminate savage and barbarous treatment. It should not be prostituted by the hallucinations of a troubled man. And that is what we have here.

APPENDIX C

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Mike Hernandez, Plaintiff-Appellant, v. George F. Denton, Director of Corrections; Paul J. Morris, Warden, Eddie Ylst, in his official and individual capacity; Mr. Hartman, Defendants-Appellees.	Nos. 86-2139 87-1693/1694 D.C. Nos. CV S-83-0645-LKK CV-S-83-1348-LKK CV-S-85-0084-LKK

On Remand from the United States
Supreme Court

Filed November 21, 1990

Richard W. Nichols, McDonough, Holland & Allen, Sacramento, Cal., for plaintiff-appellant.

Richard Thomson, Supervising Deputy Atty. Gen., Sacramento, Cal., for defendants-appellees.

Before ALDISERT,* WALLACE and SCHROEDER, Circuit Judges.

SCHROEDER, Circuit Judge:

The Supreme Court vacated our original divided disposition in this case, reported at 861 F.2d 1421 (9th Cir. 1988) and remanded for further consideration in light of *Neitzke v. Williams*, 490 U.S. 319, 109 S.Ct. 1827, 104 L.Ed.2d 338 (1989). We have given further consideration after requesting briefs from the parties as to the bearing of that decision on this case.

The appellant, Mike Hernandez, is a prisoner proceeding in forma pauperis in suits against prison officials. At issue are the district court's dismissals of complaints alleging 42 U.S.C. § 1983 violations. The district court dismissed all the claims as "frivolous" under 28 U.S.C. § 1915(d) and Hernandez appealed.

In our original opinions, we unanimously affirmed the district court's dismissal of plaintiff's procedural due process claims and his claim that prison officials violated his eighth amendment rights by depriving him of a mattress for one night. We held that no amendment could cure the defects in those allegations. *See Franklin v. Murphy*, 745 F.2d 1221, 1228 n. 9 (9th Cir. 1984). Those rulings are not affected by the subsequent grant of the defendants' petition for certiorari.

*Honorable Ruggero J. Aldisert, Senior United States Circuit Judge for the Third Circuit, sitting by designation.

In the original opinions, a majority also reversed the district court's dismissal of Hernandez' claims of rape, other physical abuse, and deprivation of footwear. The majority held that it was improper for a district court to dismiss a pro se complaint as frivolous under section 1915 unless claims were "patently meritless." We also held that the standard of "frivolousness" of section 1915(d) is not the same as the Federal Rule of Civil Procedure 12(b)(6) legal standard for dismissal for failure to state a claim. *Hernandez*, 861 F.2d at 1425. Relying upon this court's decision in *Franklin*, we held that a pro se prisoner complaint may not be dismissed under section 1915 unless it has no "'arguable substance in law [or] fact.'" *Hernandez*, 861 F.2d at 1425, quoting *Franklin*, 745 F.2d at 1227.

The Supreme Court has now held in *Neitzke*, as a majority of us originally concluded in this case, that the standard of "frivolousness" is not the same as the Rule 12(b)(6) standard, and that a complaint should not be dismissed under section 1915 simply because it fails to state a claim. The Supreme Court cited with approval our decision in *Franklin v. Murphy* in holding that a complaint is frivolous when "it lacks an arguable basis either in law or in fact" and that section 1915 "embraces not only the inarguable legal conclusion, but also the fanciful factual allegation." *Neitzke*, 109 S.Ct. at 1831.

[1] In this case, the most troublesome allegations are appellant's claims that he was drugged and homosexually raped over twenty times by inmates and prison officials at different prisons. Because the claims lacked factual recitations of time and place and persons responsible, the complaints failed to state rape claims upon which relief could be granted under the Rule 12(b)(6) standard. Nevertheless, because rape by prison guards or deliberate indifference by prison guards to rape by inmates would raise constitutional concerns, the claims were not patently without legal substance. Although the claims of such repeated similar events undoubtedly involved some exaggeration, a majority of us were unable to say with certainty that none of them occurred and that the claims were therefore lacking in any factual basis so as to be deemed "fanciful" under section 1915(d).

The appellees now ask us to reconsider that ruling in light of the Supreme Court's remand. The Supreme Court in *Neitzke* said that under section 1915 judges may dismiss as frivolous not only claims based on patiently meritless legal arguments, but those premised on baseless factual allegations as well. This holding is fully consistent with the prior law of this circuit. *See Franklin*, 745 F.2d at 1227. The defendants now focus on the Supreme Court's statement in *Neitzke* that examples of baseless factual claims are "fantastic or delusional scenarios." 109 S.Ct. at 1833. The defendants ask us to hold that Hernandez' allegations of 28 rapes are "fantastic or delusional scenarios," and affirm the district court's dismissal. If we were to affirm the district court's dismissal of all the claims as factually frivolous, however,

we would have to hold that all 28 rapes were delusions and that none of them occurred. While it is hard to believe that so many similar incidents actually happened, we cannot say that none of them occurred without making the kinds of credibility determinations that are impermissible in deciding whether a claim is baseless under section 1915. *See Franklin*, 745 F.2d at 1228.

[2] Under *Neitzke*, we do not believe that a claim can qualify as patently "delusional" or "hallucinatory" unless it rests upon facts which the court knows could not have occurred. The provision of judicial notice in Federal Rule of Evidence 201 provides guidance. It states: "A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed.R.Evid. 201(b). We accept this as one useful standard in determining whether a claim is patently frivolous as "founded on wholly fanciful factual allegations." *Hernandez*, 861 F.2d at 1426 (quotation omitted). We cannot conclude that the plaintiff's claims of rape are contrary to any facts that are "generally known," nor can we ascertain the truth of the allegations by looking to any readily available, accurate source. We therefore conclude that the district court in this case erred in dismissing the rape claims at this stage of the litigation as fanciful.

The appellant should be permitted to amend the claims to provide more specific factual recitations of the time and place of each of the rapes and conduct on the

part of prison officials which violated constitutional standards. Only when it is clear that a claim lacks legal or factual basis may it be dismissed as frivolous. *Neitzke*, 109 S.Ct. at 1831. Accordingly, while we affirm the district court's dismissal of appellant's procedural due process claim and his eighth amendment claim based upon deprivation of a mattress, we reverse the district court's dismissal of the remainder of the claims. It is not yet apparent that those claims lack either legal or factual basis.

AFFIRMED in part; REVERSED and REMANDED in part.

WALLACE, Circuit Judge, concurring:

I concur for the reasons stated in my prior concurrence, *Hernandez v. Denton*, 861 F.2d 1421, 1427 (9th Cir. 1988). For clarification, I eliminate the last ten words of the concurrence.

ALDISERT, Circuit Judge, dissenting:

The issue that divides this panel in this remand from the Supreme Court is whether the allegations contained in a pro se complaint filed by an inmate at the Atascadero State Hospital can ever survive the barrier imposed by 28 U.S.C. § 1915(d) authorizing the district court to dismiss a claim filed in forma pauperis "if satisfied that the action is frivolous." Atascadero is a state hospital for the criminally insane and mental disordered.

The majority refuse to meet the issue head on and prefer to remand to the district court to permit this obviously very disturbed inmate to file an amended complaint. They conclude that this unfortunate state prisoner should have the opportunity "to amend the claims to provide more specific factual recitations of the time and place of each of the rapes and conduct on the part of prison officials which violated constitutional standards."

I believe that no amendment can save Hernandez' fanciful claims. I reiterate the views set forth extensively in my previous dissenting opinion in *Hernandez v. Denton*, 861 F.2d 1421, 1427-40 (9th Cir. 1988) (Aldisert, J., dissenting), and would hold that no amendment of facts can cure the claims advanced by Hernandez, given the detailed facts already set forth, the theory advanced and the inferences required. I stated then and repeat now that "[t]he grand purpose of prisoner civil rights petitions under section 1983 . . . should not be prostituted by the hallucinations of a troubled man." 861 F.2d at 1440. I would affirm the judgment of the district court dismissing the complaint essentially for the reasons set forth in my separate opinion previously published at 861 F.2d at 1427-40. I believe my position in *Hernandez* has been endorsed sub silentio by the Court in its remand to us. In the words of Marshal McLuhan, "The medium is the message."

I.

The Supreme Court sent us a message by unanimous action. I am not at all certain that the majority have opted to hear it, let alone heed it. The Court directed

the majority to reconsider this case in light of *Neitzke v. Williams*, 490 U.S. 319, 109 S.Ct. 1827, 104 L.Ed.2d 338 (1989). Because our previous statement of applicable law--expressed by both the majority and the dissent--is on all fours with the Court's decision and opinion in *Neitzke*, there can be no reason for the Court to have granted certiorari and remanded for reconsideration unless it was troubled with the majority's decision to remand to permit further amendment. Having agreed completely with the majority's statement of the law, the Court would have no purpose for vacating our judgment and remanding unless it was convinced that the dissent was correct in reaching the conclusion that it was impossible to amend the complaint to assert a viable cause of action. Significantly, after reconsideration, the majority proceed as if the Court did not remand this case to us; indeed, the majority opinion responds now only to the contentions of the appellee and does not address any possible concerns of the Court.

I am convinced that my original views, although again rejected by the panel's majority, have now been endorsed by the unanimous decision of the Supreme Court in granting certiorari and remanding to us.

II.

Accordingly, some summary of the detailed facts alleged in Hernandez' complaint is in order. He claims that he was homosexually raped 28 times at both Folsom Prison and Vacaville. He reached this conclusion because he found fecal stains on his tee-shirt and needle marks on

his arms that he believed were "signs of rape." He has no personal recollection of having experienced these assaults. I have previously observed that "[i]rrespective of the outcome of this litigation, it must be acknowledged that Hernandez has established a world record capable of qualifying for the Guiness Book of Records: the only person who has been raped 28 separate times without knowing at the time that this was happening to him." 861 F.2d at 1438.

No possible amendment can cure the fatality of his claim because circumstantial evidence relied upon cannot *as a matter of law* rise to the dignity of a cause of action. I previously have demonstrated the fatal flaws of the arguments advanced:

> [H]is complaints are utterly devoid of any allegations establishing the personal involvement of any of the defendants. His contentions depend upon the following prosyllogisms and episyllogisms:
>
> A.
>
> *Major Premise:* Some needle marks are signs of drug injection.
> *Minor Premise:* I awoke with some needle marks.
> *Conclusion:* Therefore, I was drugged.

B.

Major Premise: One who is drugged can be raped without his knowledge.
Minor Premise: I was drugged.
Conclusion: Therefore, I was raped.

C.

Major Premise: Those correctional officials who are involved in or knowledgeable of inmate rapes are liable.
Minor Premise: Defendants are correctional officials.
Conclusion: Therefore, defendants are liable.

Both fallacies of form and material fallacies inhere in each of these three arguments.

861 F.2d at 1438-39; *see also* R. Aldisert, *Opinion Writing* 127 (West 1990). For a discussion of the failures in logic evidenced in these arguments and his companion allegations of rape based on presence of fecal stains and semen on his underclothes, *see* R. Aldisert, *Logic for Lawyers: A Guide to Clear Legal Thinking* 141-43, 147-54, 193-207 (Clark Boardman 1989). The brute fact is that no possible amendment of his already "specific factual recitations" can surmount to the defects in the theory upon which Hernandez bases liability.

III.

As the majority now suggest, the test of frivolousness is not measured only by dictates of judicial notice. I previously have referred to this court's leading case of *Franklin v. Murphy*, 745 F.2d 1221 (9th Cir. 1984):

> This analysis sets out *three* possible standards for dismissing a complaint as frivolous: 1) does the complaint recite bare legal conclusions without supporting facts? 2) does the complaint postulate wholly fanciful events or circumstances? 3) does the complaint conflict with facts of which a court may take judicial notice? (A fourth standard--redundancy--was added by *Tripati v. First Nat'l Bank & Trust*, 821 F.2d 1368, 1370 (9th Cir. 1987)) . . . .

As I read *Franklin*, the "wholly fanciful" and "judicial notice" standards are two separate possible bases for dismissing a complaint as frivolous. Under *Franklin*, a court may indeed dismiss an action as frivolous if it is "dependent upon allegations which conflict with facts of which a district court may take judicial notice." Schroeder op. at 1426. However, a court may *also* dismiss as frivolous an action "postulating events or circumstances of a wholly fanciful kind." *Franklin* at 1228. I find Hernandez' allegations to be indisputably wholly fanciful.

Hernandez v. Denton, 861 F.2d at 1430 (Aldisert, J., dissenting).

IV.

In *Neitzke v. Williams*, 490 U.S. 319, 327-28, 109 S.Ct. 1827, 1832-33, 104 L.Ed.2d 338 (1989), the Court has explained:

> Section 1915(d) is designed largely to discourage the filing of, and waste of judicial and private resources upon, baseless lawsuits that paying litigants generally do not initiate because of the costs of bringing suit and because of the threat of sanctions for bringing vexatious suits under Federal Rule of Civil Procedure 11. To this end, the statute accords judges not only the authority to dismiss a claim based on an indisputably meritless legal theory, but also the unusual power to pierce the veil of the complaint's factual allegations and dismiss those claims whose factual contentions are clearly baseless. Examples of the former class are claims against which it is clear that the defendants are immune from suit, *see, e.g. Williams v. Goldsmith*, 701 F.2d 603 (CA7 1983), and claims of infringement of a legal interest which clearly does not exist, like respondent Williams' claim that his transfer within the reformatory violated his rights under the Due Process Clause. Examples of the latter class are claims describing fantastic or

> delusional scenarios, claims with which federal district judges are all too familiar.

I believe that the claims of Hernandez here, a sick man transferred from Folsom Prison to the Atascadero State Hospital for psychiatric treatment, constitute a paradigm of what the Court describes as "fantastic or delusional scenarios, claims with which federal district judges are all too familiar." I am convinced that this is the only reason the Court remanded the case to us.

Accordingly, I continue to dissent and would affirm the judgment of the district court.

AFFIDAVIT OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss.
CITY AND COUNTY)
OF SACRAMENTO)

CYNTHIA BAIN, being first duly sworn on oath deposes and states:

I am 18 years of age or older and not a party to the within entitled cause; my business address is 1515 K Street, Suite 511, Sacramento, California 95814.

On January 14, 1992, I served the attached **Petitioners' Reply Brief** in said cause, by placing three true copies thereon fully prepaid, in the United States mail at Sacramento, California, addressed as follows:

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Cynthia Bain
AFFIANT

Subscribed and sworn to before
me this 14th day of January, 1992.

Lucinda Seaton
Notary Public in and for said
County and State

LUCINDA SEATON
NOTARY PUBLIC - CALIFORNIA
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My Commission Expires 2/3/93

Supreme Court, U.S.
FILED
DEC 19 1991
OFFICE OF THE CLERK

No. 90-1846

In the Supreme Court of the United States

OCTOBER TERM, 1991

GEORGE F. DENTON, ET AL., PETITIONERS

v.

MIKE HERNANDEZ

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether an action is factually frivolous, and therefore subject to dismissal under 28 U.S.C. 1915(d), only if the factual allegations in the complaint are refutable by judicial notice.

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In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 90-1846

GEORGE F. DENTON, ET AL., PETITIONERS

v.

MIKE HERNANDEZ

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF THE UNITED STATES

The United States and its officers are often sued by inmates in the federal prison system who pursue their actions *in forma pauperis* as authorized by 28 U.S.C. 1915. This case presents the question of how courts are to determine whether such actions may be dismissed under 28 U.S.C. 1915(d) as factually frivolous. The Department of Justice defends *in forma pauperis* actions brought by prisoners alleging violations of their rights by federal officials, and has a strong interest in ensuring that frivolous *in forma pauperis* claims are expeditiously identified and dismissed under Section 1915(d), while nonfrivolous claims are permitted to proceed.

STATEMENT

Petitioners are officials in the California penal system. They were sued under 42 U.S.C. 1983 by respondent Mike Hernandez, a prisoner within the system. This case concerns an *in forma pauperis*[1] pro se complaint, one of several that respondent filed, alleging that he had been drugged and raped on 28 separate occasions over a two-year period by both guards and inmates at two different prisons. Respondent claimed that these incidents violated his Eighth Amendment right not to be subjected to cruel and unusual punishment, and his Fourteenth Amendment substantive due process right to protection from other prisoners. *Hernandez* v. *Denton*, 861 F.2d 1421, 1424 (9th Cir. 1988), vacated and remanded, 493 U.S. 801 (1989), on remand, 919 F.2d 573 (1990), as amended on denial of rehearing, 929 F.2d 1374 (9th Cir. 1991).

Because the alleged druggings and rapes had occurred while respondent was asleep, he had no direct recollection of any of the alleged incidents. Pet. 4. Respondent concluded that he had been drugged and raped, however, because he allegedly found needle marks on different parts of his body and fecal and semen stains on his clothes, *ibid.*, and because he inexplicably slept much more soundly and longer than

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[1] 28 U.S.C. 1915, which was originally enacted in 1892, generally authorizes parties to proceed *in forma pauperis* upon the filing of an affidavit of poverty. Subsection (d) of that statute, which is the only pertinent provision in this case, reads in full:

> The court may request an attorney to represent any such person unable to employ counsel and may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious.

usual on the nights in question. *Id.* at 6. Finally, respondent submitted affidavits from other prisoners "assert[ing] their ability to identify some of the persons who had entered [respondent's] cell." Br. in Opp. 4. Other than the assertions in the affidavits, respondent could identify no persons, including prison officials, who participated in the 28 alleged druggings and rapes. *Ibid.*

The district court referred respondent's claims to a magistrate, who concluded that respondent's complaints alleged fanciful scenarios, and were therefore frivolous. Accordingly, the magistrate recommended that the claims be dismissed under 28 U.S.C. 1915(d). Br. in Opp. 3-4. The district court agreed that the factual allegations in respondent's complaint were frivolous, and ordered the case dismissed. *Ibid.*

The Ninth Circuit reversed. 861 F.2d 1421 (1988). The court held that factual allegations in a pro se *in forma pauperis* complaint could be found "wholly fanciful" only if a court could take judicial notice that they did not occur. *Id.* at 1426. Although agreeing that it was "hard to believe" that respondent could have been raped 28 separate times without knowing it, the court could not say with certainty that respondent was *never* raped. *Id.* at 1427. The court therefore reversed the district court's finding that the complaint was factually frivolous. *Ibid.*

Judge Wallace concurred on the narrow ground that, although respondent had been given an opportunity to amend his complaint (and in fact had done so), the district court had failed to give respondent sufficient guidance regarding the deficiencies in his original complaint, as required by circuit law. 861 F.2d at 1427 (Wallace, J., concurring).

Judge Aldisert dissented. In his view, respondent's allegations were clearly "the hallucinations of a trou-

bled man," 861 F.2d at 1440 (Aldisert, J., dissenting); moreover, in view of respondent's inability to connect any individuals to his allegations, Judge Aldisert concluded that no further amendment could save the complaint. *Id.* at 1439-1440. Judge Aldisert discounted the usefulness of one affidavit purporting to identify two prisoners who had allegedly raped respondent, noting that at most the affidavit might have supported a state-law tort claim; the affidavit in question (which was the only one mentioned at any point in the three opinions issued by the court of appeals) did not, in Judge Aldisert's view, support or make plausible respondent's claim of 28 separate rapes over two years. *Id.* at 1436-1437.

This Court vacated the Ninth Circuit's judgment and remanded for further consideration in light of the intervening decision in *Nietzke* v. *Williams*, 490 U.S. 319 (1989). *Denton* v. *Hernandez*, 493 U.S. 801 (1989). On remand, the Ninth Circuit reaffirmed its earlier decision. Pet. App. A1-A16. The court purported to soften its earlier holding that *only* factual allegations subject to refutation by judicial notice are frivolous under Section 1915(d). The court stated that judicial notice was "one useful standard in determining whether a claim is patently frivolous as 'founded on wholly fanciful factual allegations.'" Pet. App. A8-A9. Relying on its earlier analysis, the Ninth Circuit stated that because it could not take judicial notice that none of the rapes occurred, the district court erred in dismissing the complaint as factually frivolous under Section 1915(d). Pet. App. A8-A9. Notwithstanding its statement that judicial notice was merely one method for determining factual frivolity, the court did not analyze the case under any other method that it thought might be appropriate.

SUMMARY OF ARGUMENT

In *Nietzke* v. *Williams*, 490 U.S. 319, 325 (1989), this Court established that complaints lacking an "arguable basis either in law or in fact" are frivolous and therefore subject to dismissal under 28 U.S.C. 1915(d). Since *Nietzke*, however, the Court has not had occasion to elaborate on the standard enunciated in that case; as a result, the lower courts have been left without guidance in analyzing whether allegations in an *in forma pauperis* complaint lack an "arguable basis" in fact.

The "judicial notice" standard followed by the Ninth Circuit in this case is inconsistent with both the language of Section 1915(d), which states that a court may dismiss if "satisfied" that the action is frivolous, and this Court's statement in *Nietzke* that Section 1915(d) gives district courts the "unusual power to pierce the veil of [a] complaint's factual allegations." 490 U.S. at 327. In addition, other courts of appeals, while generally eschewing a standard as restrictive as the Ninth Circuit's, have not developed a consistent approach that allows arguably meritorious claims to go forward while pretermitting factually baseless litigation. As a general matter, the lower courts have stated that inarguable factual claims are frivolous, but they have not settled upon a concrete, objective approach to determining whether particular allegations are inarguable.

A more predictable and objective standard—and one that gives due effect to the purposes underlying Section 1915—is readily at hand. That standard was intimated in *Nietzke* itself, where the Court indicated that Section 1915(d) serves the same purpose in the context of *in forma pauperis* suits that Federal Rule of Civil Procedure 11 serves with respect to pay-

ing litigants. See 490 U.S. at 327. As the Court explained in *Nietzke*, because *in forma pauperis* litigants are not deterred from advancing factually frivolous claims by the threat of financial sanctions under Rule 11, Section 1915(d) is properly interpreted to serve the same deterrent purpose. Courts should therefore look to Rule 11 and precedent under that Rule in construing Section 1915(d), and district courts should be free to dismiss a complaint under Section 1915(d) if an attorney or party who signed the same complaint would have been subject to sanctions under Rule 11.

This Rule 11-based standard would effectuate the purposes of Section 1915(d) and recognize that *in forma pauperis* litigants are no more free to mount factually frivolous claims than are paying litigants or their lawyers, who face the threat of financial sanctions if they succumb to the temptation of doing so. Applying that standard to this case, the district court acted properly in dismissing respondent's complaint because no reasonable attorney or paying litigant could have concluded that the allegations in the complaint were well grounded in fact.

Finally, regardless of the substantive standard that guides the exercise of discretion in this area, the language and purposes of the statute—as well as this Court's prior decisions—make clear that district courts enjoy broad discretion to determine when dismissal under Section 1915(d) is appropriate. Accordingly, trial court decisions to dismiss under Section 1915(d) should be reviewable on appeal only for abuse of discretion. In this case, the district court acted within its sound discretion in dismissing respondent's bizarre claim that he was drugged and raped 28 times by unknown assailants; the Ninth Circuit's decision to the contrary should be reversed.

ARGUMENT

I. THE COURT OF APPEALS ERRED IN REVERSING THE DISTRICT COURT ON THE GROUND THAT THE FACTUAL ALLEGATIONS IN THE COMPLAINT WERE NOT SUBJECT TO REFUTATION BY JUDICIAL NOTICE

The federal *in forma pauperis* statute, 28 U.S.C. 1915, ensures that impecunious citizens enjoy the same access to the federal courts as litigants who are able to pay. *Nietzke* v. *Williams*, 490 U.S. at 324. As this Court has noted, however, the right to proceed *in forma pauperis* is vulnerable to abuse because *in forma pauperis* litigants are not deterred by financial incentives "from filing frivolous, malicious, or repetitive lawsuits." *Ibid.* The potential for abuse of Section 1915 is especially acute in the context of suits by prison inmates. Such individuals not only have no financial disincentive to mount such claims, but may look upon bringing suit as a means to "obtain[] a short sabbatical in the nearest federal courthouse." *Cruz* v. *Beto*, 405 U.S. 319, 327 (1972) (Rehnquist, J., dissenting). Section 1915(d), which permits a court to dismiss a case if "satisfied" that the action is frivolous or malicious, is intended to prevent such abuses. To that end, dismissals under Section 1915(d) often occur *sua sponte* before process is issued—an important and salutary procedure which "spare[s] prospective defendants the inconvenience and expense of answering such complaints." *Nietzke*, 490 U.S. at 324.

In enacting Section 1915(d), Congress afforded little concrete guidance in interpreting the statute. As this Court stated in *Nietzke*, "[t]he brevity of Section 1915(d) and the generality of its terms have left the judiciary with the not inconsiderable tasks of

fashioning the procedures by which the statute operates and of giving content to Section 1915(d)'s indefinite adjectives." 490 U.S. at 324-325 (footnote omitted). In its first statement giving content to Section 1915(d), the Court in *Nietzke* stated that a complaint is frivolous within the meaning of that statute if it has no "arguable basis either in law or in fact." 490 U.S. at 325.[2] The Court has not, however, had occasion to elaborate on the *Nietzke* standard, and, in particular, has not provided the lower courts with guidance in determining whether allegations of fact have an "arguable basis" within the meaning of Section 1915(d).

After this Court's remand of the case for further consideration in light of *Nietzke*, the Ninth Circuit adhered to its prior method of determining whether factual allegations are frivolous. That standard is this: District courts cannot dismiss complaints as factually frivolous unless the allegations set forth in the complaint are refutable by judicial notice.[3] Under this test, a complaint must be literally delusional or demonstrably inconsistent with publicly known facts to fall within Section 1915(d)'s reach. Thus, as long

[2] The holding in *Nietzke* was that an *in forma pauperis* complaint that fails to state a claim under Fed. R. Civ. P. 12(b)(6) is not as a result automatically frivolous within the meaning of Section 1915(d). After *Nietzke*, a complaint is *legally* frivolous under Section 1915(d) if " '[none] of the legal points [is] arguable on [its] merits.' " *Nietzke*, 490 U.S. at 325, quoting *Anders* v. *California*, 386 U.S. 738, 744 (1967). The issue of how to determine whether factual allegations are frivolous was not directly presented in *Nietzke*.

[3] The court of appeals purported to hold that judicial notice is just "one useful standard" for determining factual frivolity, Pet. App. A8-A9, but failed even to mention any other standard, much less apply one to the facts of this case.

as the allegations could possibly have occurred as a metaphysical matter, district courts are bound to let the case go forward.

This sweeping standard is inconsistent with this Court's statement in *Nietzke* that Section 1915(d) "accords judges * * * the unusual power to pierce the veil of the complaint's factual allegations and dismiss those claims whose factual contentions are clearly baseless." 490 U.S. at 327. There is nothing "unusual" about rejecting claims refutable by judicial notice; this Court plainly had something more in mind given its statement in *Nietzke*. More fundamentally, the court of appeals' judicial notice standard is at odds with the goals underlying Section 1915(d), namely to

> enable a district court to determine at the earliest possible stages in pro se litigation whether there is any merit to an [*in forma pauperis*] proceeding. * * * An early determination of the merits of an [*in forma pauperis*] proceeding provides a significant benefit to courts (because it will allow them to use their scarce resources effectively and efficiently), to state officials (because it will free them from the burdens of frivolous and harassing litigation), and to prisoners (because courts will have the time, energy and inclination to give meritorious claims the attention they need and deserve).

Green v. *McKaskle*, 788 F.2d 1116, 1120 (5th Cir. 1986). The court of appeals' decision will unjustifiably hamper the ability of district courts expeditiously to dispose of factually frivolous claims—"claims with which federal district judges are all too familiar." *Nietzke*, 490 U.S. at 328. The "judicial notice" standard should accordingly be rejected.

In general, the courts of appeals have not settled upon a consistent approach for determining whether factual allegations are frivolous. By and large, the standards those courts have adopted track this Court's statement in *Nietzke* that allegations without an arguable basis in fact are frivolous. 490 U.S. at 325. As a result of the generality of the *Nietzke* standard, however, this facial harmony gives way to varying applications in the cases, sometimes even within the same circuit.[4]

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[4] See, *e.g.*, *Luciano* v. *Galindo*, 944 F.2d 261, 265 (5th Cir. 1991) (two-part inquiry into whether the complaint has a realistic chance of ultimate success on the merits or whether it lacks an arguable factual basis); *Mayfield* v. *Collins*, 918 F.2d 560 (5th Cir. 1990) (same); *Clark* v. *Georgia Pardons & Paroles Bd.*, 915 F.2d 636 (11th Cir. 1990) (whether complaint has realistic chance of success, which is measured by whether the allegations are arguable); *Battle* v. *Central State Hosp.*, 898 F.2d 126, 129-130 (11th Cir. 1990) (whether allegations are "clearly baseless" or have "some rational basis"); *Williams* v. *Faulkner*, 837 F.2d 304, 308 (7th Cir. 1988) (whether plaintiff can make a "rational argument in law or fact"), aff'd on other grounds, 490 U.S. 319 (1989); *Brandon* v. *District of Columbia Bd. of Parole*, 734 F.2d 56 (D.C. Cir. 1984) (whether the allegations are supportable by an arguable basis in fact), cert. denied, 469 U.S. 1127 (1985); *Crisafi* v. *Holland*, 655 F.2d 1305 (D.C. Cir. 1981) (whether the allegations are wholly fanciful or conflict with facts that are subject to judicial notice) (per curiam); *Lawler* v. *Marshall*, 898 F.2d 1196, 1199 (6th Cir. 1990) (whether factual allegations are rational and not the product of true delusion); *Malone* v. *Colyer*, 710 F.2d 258, 261 (6th Cir. 1983) (rejecting the "no realistic chance of success" formulation); *White* v. *White*, 886 F.2d 721 (4th Cir. 1989) (rejecting Sixth Circuit's approach in favor of an "arguable basis" standard requiring specificity in factual allegations); *Boyce* v. *Alizaduh*, 595 F.2d 948, 952 (4th Cir. 1979) (rejecting "no realistic chance of success" approach); *Nance* v. *Kelly*, 912 F.2d 605, 606 (2d Cir. 1990) (whether factual allegations are "clearly baseless"); *Anderson* v. *Coughlin*, 700 F.2d 37 (2d Cir. 1983) (whether there is little chance for ultimate success on the merits); *Dace* v. *Solem*, 858 F.2d 385, 387-388 (8th Cir. 1988) (whether plaintiff can make a "factually rational" argument in support of his claim, which is seemingly equivalent to whether it is "conceivable" that evidence to support the claim could be developed); *Roman* v. *Jeffes*, 904 F.2d 192, 195 (3d Cir. 1990) (whether the allegations in the complaint are clearly baseless); *Wilson* v. *Rackmill*, 878 F.2d 772, 774 (3d Cir. 1989) (whether allegations are fanciful or delusional).

In short, the lower courts have failed to develop a satisfactory method for determining what constitutes a "clearly baseless" allegation, or an "irrational" one, or one with no "arguable" basis. To the extent that the standards followed by the lower courts do provide predictability, moreover, it is at the expense of requiring district courts to permit baseless cases to go forward. See, *e.g.*, *Lawler* v. *Marshall*, 898 F.2d at 1199 (defining delusional allegation as one "asserting that Robin Hood and his Merry Men * * * or that a genie" wronged plaintiff). A more objective formulation—and one which serves the dual purposes of Section 1915 as described by the Court in *Nietzke*—is readily available in a closely related body of federal law.

II. FACTUAL ALLEGATIONS IN A COMPLAINT ARE "INARGUABLE," AND THEREFORE FRIVOLOUS UNDER SECTION 1915(d), IF NO REASONABLE ATTORNEY OR PAYING LITIGANT WOULD CERTIFY THAT THEY ARE "WELL GROUNDED IN FACT" WITHIN THE MEANING OF FED. R. CIV. P. 11

A. Section 1915(d) Should Have The Same Deterrent Effect In *In Forma Pauperis* Litigation That Rule 11 Has In Paid Litigation

This Court made clear in *Nietzke* that the function of Section 1915(d) is to provide both courts and defendants with protection from frivolous or malicious claims filed by *in forma pauperis* litigants. Without Section 1915(d) there would be no check on frivolous *in forma pauperis* litigation because such litigants lack any financial incentive not to advance such claims. This Court in *Nietzke* stated

> Section 1915(d) is designed largely to discourage the filing of, and waste of judicial and private resources upon, baseless lawsuits that paying litigants generally do not initiate because of the costs of bringing suit and because of the threat of sanctions for bringing vexatious suits under Federal Rule of Civil Procedure 11.

490 U.S. at 327. The Court went on to explain that Section 1915(d) "replicat[es] the function of screening out inarguable claims which is played in the realm of paid cases by financial considerations," and that the "cost of bringing suit and the fear of financial sanctions doubtless deter most inarguable paid claims." 490 U.S. at 328.

As the Court noted, the Federal Rules of Civil Procedure explicitly deter paying litigants—on whom financial considerations have an obvious impact—

from filing factually frivolous pleadings. Rule 11 requires that a party or his lawyer sign each pleading or motion in a case. That signature certifies, among other things, that after reasonable inquiry the signer has concluded that "the pleading is well grounded in fact." Fed. R. Civ. P. 11. Upon determining that a violation of Rule 11 has occurred, courts must impose a sanction, which may include payment of the other side's attorney fees. In the realm of paid litigation, most factually inarguable (*i.e.*, frivolous) claims are undoubtedly never filed because no counsel would agree to certify that such factual allegations are reasonably well grounded.

In *in forma pauperis* litigation, by contrast, the threat of sanctions under Rule 11 has no practical effect because such litigants by definition have nothing to lose. See *Nietzke*, 490 U.S. at 327-328. It is beyond question, however, that *in forma pauperis* litigants (even those proceeding pro se) are no more at liberty to bring frivolous claims or make baseless factual allegations than are paying litigants or their counsel. *Business Guides, Inc.* v. *Chromatic Communications Enterprises, Inc.*, 111 S. Ct. 922 (1991). Section 1915(d) should threaten *in forma pauperis* plaintiffs with dismissal of factually frivolous actions in the same way that Rule 11 threatens financial sanctions against those who make similar allegations in paid litigation.

If the factual allegations in an *in forma pauperis* complaint would expose a party or his attorney to sanctions under Rule 11 for filing a pleading that is not well grounded in fact, those factual allegations are frivolous within the meaning of Section 1915(d). As a practical matter, this means that a complaint is frivolous within the meaning of Section 1915(d) if

its factual allegations are so implausible or unlikely to have occurred that a reasonable attorney, knowing all the circumstances, would have refused to sign the pleading to certify that it was well grounded in fact.[5]

The standard for determining whether a pleading is well grounded in fact under Rule 11 is well established. This Court, embracing the rule previously adopted by every circuit, has agreed that the Rule requires an objective standard. *Business Guides, Inc.* v. *Chromatic Communications Enterprises, Inc.*, 111 S. Ct. at 931-933. That standard asks whether it was reasonable under the circumstances for the attorney or party to certify that the pleading, motion or paper was well grounded in fact. *Ibid.* See also 5A C. Wright & A. Miller, *Federal Practice and Procedure* § 1335, at 61-62 & n.12 (1990) (gathering cases).

In determining whether a pleading is well grounded in fact, it is clear that the signer has "an affirmative duty to conduct a reasonable inquiry into the facts * * * before filing" the complaint. *Business Guides, Inc.*, 111 S. Ct. at 933. That inquiry must result in a

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[5] In *Business Guides*, the Court held that Rule 11 applies to whoever signs a pleading and thereby certifies that it is well grounded in fact—whether the signer is a party (represented by counsel or not) or a lawyer. 111 S. Ct. at 928-931. The Court also held that the standard for determining whether a Rule 11 violation had occurred—whether the signer's action was reasonable under the circumstances—is the same regardless whether it was a party or lawyer who signed the potentially sanctionable pleading. *Id.* at 931-933. Indeed, the Court suggested that because parties are generally in a better position than their lawyers to know the underlying factual basis for their complaints, what is "reasonable under the circumstances" for them may sometimes be more stringent than what is reasonable for their lawyers. *Ibid.*

"substantiated belief" that the pleading is well grounded in fact. *Cooter & Gell* v. *Hartmarx Corp.*, 110 S. Ct. 2447, 2454 (1990). Whether the attorney or party has taken adequate steps in arriving at such a belief is measured by the objective standard of "reasonableness under the circumstances." *Business Guides, Inc.*, 111 S. Ct. at 933.

In discharging his duty to conduct a reasonable investigation, a lawyer cannot take "safe harbor" in relying on the truth of his "client's careless misrepresentations." 111 S. Ct. at 933. Rather, there is an independent duty to verify the client's story, which is discharged by pursuing avenues of investigation that are reasonably available. See, *e.g.*, *Brown* v. *Federation of State Medical Bds.*, 830 F.2d 1429 (7th Cir. 1987). For example, it is sanctionable not to review documents that might refute or verify a client's claim. *Id.* at 1436-1437. Moreover, an attorney must attempt to corroborate his client's second-hand account of an occurrence, *Hilton Hotels Corp.* v. *Banov*, 899 F.2d 40, 43 (D.C. Cir. 1990), and cannot take his client's word for what happened. *Muraoka* v. *American Osteopathic Assoc.*, 117 F.R.D. 616 (N.D. Ill. 1987).

In addition to considering the reasonableness of the signer's conduct, however, the *substance* of the allegations in question is part of the Rule 11 inquiry. Some allegations are so unreasonable and implausible that no investigation could result in a reasonable, substantiated belief that they are true. As one court noted, the question of whether an attorney's investigation is reasonable depends in part on the inherent plausibility of the facts alleged. *Calloway* v. *Marvel Entertainment Group*, 854 F.2d 1452, 1470 (2d Cir. 1988), rev'd in part on other grounds, 493 U.S. 120

(1989). Thus, a lawyer may not urge a factual claim that any reasonable lawyer would have disbelieved—no matter how broad an investigation he has pursued. *Lemaster* v. *United States*, 891 F.2d 115, 119-120 (6th Cir. 1989). And if it is apparent from the substance of a witness' proposed testimony that it is unbelievable and incredible, a lawyer could not reasonably believe that a fact-finder might conclude otherwise. *Id.* at 121; see also *California Architectural Bldg. Prods., Inc.* v. *Franciscan Ceramics, Inc.*, 818 F.2d 1466, 1472 (9th Cir. 1987) (pleading is sanctionable if it is factually baseless and "lacking in plausibility"), cert. denied, 484 U.S. 1006 (1988); *Rachel* v. *Banana Republic, Inc.*, 831 F.2d 1503, 1508 (9th Cir. 1987) (same).

The Rule 11 inquiry translates well to the Section 1915(d) context. Considering all the circumstances—including the factual allegations on the face of the complaint, any corroborative evidence that is offered, and any other information available regarding the case or the plaintiff—would a reasonable inquiry by an attorney or paying litigant (for whom the prospect of financial sanctions is a deterrent) have led him to conclude that the complaint was well grounded in fact? In this context, it is important to note that *in forma pauperis* civil rights plaintiffs are properly required specifically to plead all facts that corroborate their claims, which is the "rule adopted in some form by every circuit." *White* v. *White*, 886 F.2d 721, 724 (4th Cir. 1989). Some factual scenarios are so implausible that no reasonable attorney or paying litigant could conclude, after any amount of investigation, that they in fact occurred. Under Section 1915(d), district courts should be permitted to dismiss complaints that are based on such scenarios.

This standard gives effect to Section 1915's dual purposes. It preserves claims that are plausible enough for a reasonable lawyer or paying litigant to bring. At the same time, it permits courts to disbelieve outlandish claims in the same way that a competent lawyer would.[6]

Neither the language of Section 1915(d) nor its underlying purposes requires more. Nor is our suggested approach inconsistent with the well-established proposition that pro se complaints are to be liberally construed. See *Haines* v. *Kerner*, 404 U.S. 519, 520 (1972).[7] As this Court explicitly stated in *Nietzke*, the purpose of Section 1915 is to put *in forma pauperis* litigants—who proceed most often on a pro se basis—on "similar footing" with those who can pay. 490 U.S. at 330. The principle favoring liberal construction of pro se pleadings comes from a recognition that pro se litigants are often "less capable [than

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[6] The standard we propose allows district courts to disbelieve factual allegations that are inherently implausible, even if they are not literally delusional. Some circuits, however, require as part of the Section 1915(d) analysis that the truth of a complaint's factual allegations be assumed. See *Money* v. *Moore*, 877 F.2d 9 (8th Cir. 1989); *Hernandez* v. *Denton*, 861 F.2d at 1424 (citing *Franklin* v. *Murphy*, 745 F.2d 1221, 1227 (9th Cir. 1984)); *Malone* v. *Colyer*, 710 F.2d 258, 260 (6th Cir. 1983). The rule adopted by these courts is contrary both to the language of the statute, which allows courts to dismiss if they are "satisfied" that a case is frivolous, and to this Court's clear statement in *Nietzke* that Section 1915(d) gives courts the "unusual power to pierce the veil of the complaint's factual allegations." 490 U.S. at 327.

[7] The canon mandating liberal construction of pro se complaints does not necessarily apply in interpreting Section 1915(d), because *in forma pauperis* actions may be brought by litigants who are represented by counsel. See *Nietzke*, 490 U.S. at 330 n.9.

attorneys] of formulating legally competent initial pleadings," *ibid.* (citing *Haines* v. *Kerner*, 404 U.S. at 520). Liberal construction of a complaint does not mean, however, that pro se *in forma pauperis* plaintiffs are somehow freer to raise inarguable factual claims.

Thus, we believe that a complaint "lacks an arguable basis * * * in fact," *Nietzke*, 490 U.S. at 325, where no reasonable attorney or paying litigant would expose himself to sanctions by certifying that its allegations are well founded.[8] The objective standard used by the courts of appeals in evaluating whether factual allegations are sanctionable under Rule 11 is not only easier to apply than the Section 1915(d) standards heretofore followed by the courts of appeals, but it is also more faithful to the underlying purposes of Section 1915(d).

B. Rule 11 Would Have Deterred A Paying Litigant Or His Attorney From Signing Respondent's Complaint Because Its Factual Allegations Are Inherently Implausible And Illogical

Respondent's complaint in this case alleged that he had been drugged and raped on 28 separate occasions over a two-year period at two different penal institutions—all without his knowledge. Respondent did not plead any facts to make this facially implausible scenario appear at all likely to have occurred. Indeed, the only "evidence" respondent claimed to have was that he (1) found inexplicable needle marks on his body; (2) found inexplicable fecal and semen stains on his clothing; (3) slept longer and more soundly than usual on the nights in question; and (4) had been taunted by prison guards and inmates, which led him to conclude that he had been drugged and raped.[9]

A reasonable lawyer confronted with this story would not dream of filing a complaint based upon it. Even if one assumes that respondent in fact found needle marks on his body and stains on his clothes, it does not follow that he was ever drugged and raped. It is even more illogical to think that any particular prison officials (who respondent admits he cannot identify) had any hand in the alleged wrongdoing.

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[8] The standard we advocate is also consistent with *Anders* v. *California*, 386 U.S. 738, 744 (1967), in which the Court determined that an appeal is legally frivolous if none of the legal points is "arguable on [its] merits." In *Nietzke*, the Court noted that, "[b]y logical extension [from *Anders*], a complaint, containing as it does both factual allegations and legal conclusions, is frivolous where it lacks an arguable basis either in law or in fact." 490 U.S. at 325. If a complaint's factual allegations are so implausible that no reasonable attorney would make them, those allegations are inarguable—which is of course the formulation used in both *Anders* and *Nietzke*.

[9] Respondent did offer the affidavit of another prisoner, which stated that the prisoner had on one occasion witnessed respondent being raped in his sleep by two other inmates. Although this evidence might have supported a plausible claim of some sort, it cannot support, and does not make any more plausible, a claim that respondent was raped without his knowledge by a variety of persons on 28 separate occasions at different places over a two year period. See *Hernandez* v. *Denton*, 861 F.2d at 1437 (Aldisert, J., dissenting). To the contrary, the claim of 28 separate rapes makes the allegedly witnessed rape *less* plausible, rather than the allegedly witnessed rape making the other alleged rapes more plausible. Moreover, the district court gave respondent an opportunity to amend his complaint, presumably to plead a *more* realistic cause of action which was tied to the evidence provided by the affidavit in question, but respondent did not do so.

In truth, respondent's claim is entirely implausible. No competent lawyer or paying litigant, after conducting a reasonable investigation, would have filed this claim. To do so would have assured that Rule 11 sanctions would fall like rain. Thus, the district court acted entirely properly in dismissing respondent's claims as factually frivolous under Section 1915(d).

III. SECTION 1915(d) AFFORDS DISTRICT COURTS BROAD DISCRETION TO DISMISS A CASE WHEN THEY ARE "SATISFIED THAT [IT] IS FRIVOLOUS OR MALICIOUS"

Regardless of the substantive standard applied in evaluating Section 1915(d) dismissals, it is plain that Section 1915(d) accords district courts discretion to determine when a case is frivolous or malicious. First, the statute by its clear terms provides that courts "may" dismiss upon becoming "satisfied that the action is frivolous or malicious." 28 U.S.C. 1915(d). Second, this Court has "recognize[d] that [Section 1915(d)] vests the federal courts with broad discretion to * * * identify and dismiss frivolous complaints." *Boag* v. *MacDougall*, 454 U.S. 364, 365 n.* (1982); see also 454 U.S. at 368-369 (Rehnquist, J., dissenting).[10] Thus, the statute provides any federal court with discretion to dismiss an *in forma*

[10] Section 1915(d) applies generally to all federal courts. Thus, by the statute's terms any federal court has discretion to dismiss a case before it when it deems such action appropriate. This Court, for example, has itself exercised the discretion vested in it by Section 1915(d) to bar prospectively certain litigants from proceeding on an *in forma pauperis* basis. See, *e.g.*, *In re Sindram*, 111 S. Ct. 596 (1991); *In re McDonald*, 489 U.S. 180 (1989).

pauperis case before it upon becoming satisfied that the action is frivolous.

Despite this seemingly clear principle, the Ninth Circuit reviews decisions to dismiss under Section 1915(d) on a de novo basis. See *Jackson* v. *Arizona*, 885 F.2d 639, 640 (1989). This is inconsistent not only with the language of the statute and this Court's construction of it in *Boag*, but it also flies in the face of the decisions of other courts of appeals. See, *e.g.*, *Ross* v. *Social Security Admin.*, No. 90-2697 (8th Cir. Nov. 26, 1991); *Clark* v. *Georgia Pardons & Paroles Bd.*, 915 F.2d 636 (11th Cir. 1990); *Wesson* v. *Oglesby*, 910 F.2d 278 (5th Cir. 1990); *Williams* v. *Faulkner*, 837 F.2d 304 (7th Cir. 1988), aff'd, 490 U.S. 319 (1989); *Yellen* v. *Cooper*, 828 F.2d 1471 (10th Cir. 1987); *Brandon* v. *District of Columbia Bd. of Parole*, 734 F.2d 56 (D.C. Cir. 1984), cert. denied, 469 U.S. 1127 (1985); *Anderson* v. *Coughlin*, 700 F.2d 37 (2d Cir. 1983); *Boyce* v. *Alizaduh*, 595 F.2d 948 (4th Cir. 1979); but cf. *Young* v. *Kann*, 926 F.2d 1396 (3d Cir. 1991) (reviewing de novo district court decision to dismiss action as legally frivolous under Section 1915(d)). Indeed, the Ninth Circuit itself sometimes reviews district court decisions to dismiss under Section 1915(d) on an abuse of discretion basis, and is therefore inconsistent in its own approach. See *Fay* v. *Quinlan*, No. 89-35404 (9th Cir. 1991), slip op. n.2 (noting that the Ninth Circuit has been inconsistent in the standard of review that is applied) (unpublished).

The need for discretion in the district courts is especially acute in the Section 1915(d) context. District courts are regrettably familiar with the flood of *in forma pauperis* litigation that has overtaken the federal courts in recent years. *Nietzke*, 490 U.S.

at 328. See also *Hernandez* v. *Denton*, 861 F.2d at 1430-1433 (Aldisert, J., dissenting) (gathering statistics). Experience has proven that a great deal of this litigation is entirely baseless. This genre of litigation demeans our system of justice and deflects scarce judicial resources from claims of potential merit. It is therefore important not to deprive federal judges of a basic tool that protects the integrity of ever-growing dockets. As the Court has explained in the Rule 11 context, district courts are "[f]amiliar with the issues and litigants" and hence are "better situated than the court[s] of appeals" to evaluate the facts and apply the relevant fact-dependent legal standard. *Cooter & Gell* v. *Hartmarx Corp.*, 110 S. Ct. at 2459. See also *id.* at 2457-2461 (holding that imposition of Rule 11 sanctions is reviewable on appeal only for abuse of discretion). These factors are equally, if not more, prevalent in the Section 1915(d) context.

Accordingly, district courts should enjoy broad discretion to dismiss actions under Section 1915(d), and such decisions should be reviewable on appeal only for abuse of that discretion. Here, the district court properly exercised its discretion in dismissing respondent's far-fetched claim that he was drugged and raped 28 times by unknown assailants.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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GEORGE F. DENTON, *et al.*,

Petitioners,

v.

MIKE HERNANDEZ,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

AMICUS CURIAE BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, THE NATIONAL PRISON PROJECT AND THE NORTHERN CALIFORNIA AFFILIATE OF THE ACLU IN SUPPORT OF RESPONDENT

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OTHER AUTHORITIES:

Comprehensive Textbook of Psychiatry (H. Kaplan and B. Sadock ed. 4th ed. 1985) 28

The Harvard Guide to Modern Psychiatry (A. Nicholi ed. 1978) 28

Wright & Miller, Federal Practice and Procedure Civil 2d (1990) . . 31

W. Wooden and J. Parker, Men Behind Bars: Sexual Exploitation in Prison (1982) 28

No. 90-1846

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1991

GEORGE F. DENTON, et al.,

Petitioners,

v.

MIKE HERNANDEZ,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

AMICUS CURIAE BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, THE NATIONAL PRISON PROJECT AND THE NORTHERN CALIFORNIA AFFILIATE OF THE ACLU IN SUPPORT OF RESPONDENT

INTEREST OF AMICI[1]

The American Civil Liberties Union (ACLU) is a nation wide, non-partisan organization of nearly 300,000 members. The ACLU is dedicated to preserving the Bill of Rights. The ACLU of Northern California is

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[1] The parties have consented to the filing of this brief, as indicated by their letters of consent filed with the Clerk of the Court.

one of the ACLU's state affiliates. The ACLU established the National Prison Project in 1972 to protect and promote the constitutional and civil rights of prisoners.

The ACLU has an interest in the standard adopted by the Court for the dismissal of an unrepresented, indigent prisoner's §1983 challenge to the alleged denial of his constitutional rights because of the ACLU's concern for preserving meaningful access to the federal courts for all persons seeking to raise constitutional claims.

STATEMENT OF THE CASE

This case involves the appropriateness of the trial court's use of 28 U.S.C. §1915(d)[2]

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[2] §1915 provides in pertinent part as follows:

> (a) Any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees and costs or security therefor, by a person who makes affidavit that he is unable to pay such costs or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that he is entitled to redress.
>
> * * *
>
> (d) The court may request an attorney to represent any such person unable to employ counsel and may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious.

to dismiss several complaints of an unrepresented indigent prisoner. Relevant allegations in each complaint are summarized below:

1. Civ. S-83-0645-LKK (Court of Appeals 86-2139).

The respondent prisoner alleged that "he was sexually assaulted and raped by correctional officers in cell 1303 Building 2" at the California State Prison at Folsom

on the night of July 29, 1982. Amended Complaint 6/25/84, p.5. He further alleged that he discovered "evidence and signs of rape on his clothing" that day and that he overheard staff and other prisoners taunting and ridiculing him about the rape. Id. He alleged that he told the disciplinary committee at the prison about the rape but that he was never given the results of any investigation into his allegations. Id. at 5-6. He did not identify the correctional officers allegedly responsible for the rape.

Respondent also alleged that he was forced to sleep without a mattress for one night. He further alleged that he was denied a pair of shoes for approximately thirty days during a time when he had access to only a single blanket, borrowed from another prisoner, and suffered from freezing weather conditions because he was housed in a cell located across from broken windows. Id. at 8.

2. Civ. S-83-1348-LKK (Court of Appeals 87-1693).

The respondent alleged that he believed that one or more other prisoners at the California Medical Facility at Vacaville had raped him on July 29, 1983, and that he had found signs and evidence of rape on his clothing. Notice of Motion and Motion for Leave to Amend Civil Rights Complaint and Supplemental Pleadings under Rule 15, and Demand for Jury Trial, 6/17/84, p.4. (Hereafter "Second Complaint"). Attachment G to the complaint was an affidavit signed by a fellow prisoner, averring that on the night of July 29, 1983, he "witnessed inmate Dushane B-71187 and inmate Milliard B-30802 assault and rape inmate Mike Hernandez as he lay asleep in bed 206 in the N-2 unit dorm."

The respondent further alleged that he had discovered a number of needle puncture wounds on various parts of his body. Second Complaint at 4. He also alleged that he was hit on the head by one

or more other prisoners while he was asleep on December 14, 1983, and that he had found evidence of sexual assault on his clothing on December 17, 1983. Id. at 6. Respondent alleged that he was injured, and that the injuries were caused by the petitioners' malicious conduct in housing him in the unit. Id. at 8.

Attachment B to the Second Complaint is a statement by respondent signed under pain of perjury averring in relevant part that on July 30, 1983, respondent told petitioners Hartman and Ingle[3] that he had been the victim of a rape, that he had found feces and semen stains on his shorts, and that he believed he had been raped, after being hit in the head, by one or more of the

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[3] The named petitioners in each complaint were alleged to be staff at the facility in which respondent was confined at the time of the complaint. The Second Complaint identifies petitioner Hartman as a lieutenant and petitioner Ingle as a sergeant at the California Medical Facility. Second Complaint at 3.

other prisoners housed in his dorm. The statement further averred that he had told petitioner Ingle that someone had hit him in the head during the night or morning and that he believed that someone had injected him with an unknown substance. It further averred that he had displayed a number of needle puncture wounds to staff members on August 3. Attachment D averred additional instances of discovering puncture wounds and indicated that respondent believed he had been drugged and raped on August 5, 1983.

3. Civ. S-85-0084-LKK (Court of Appeals 87-1964).

In relevant part, respondent alleged that, while he was confined at the California Medical Facility at Vacaville on or about January 13, 1984, petitioner McIntyre, a staff correctional officer, allowed himself and two prisoners into the respondent's cell, where they drugged, sexually assaulted, and possibly raped respondent while he was asleep. Complaint,

12/28/84, pp. 15-16. (Hereafter "Third Complaint"). Respondent alleged that similar events occurred on January 27, 1984. Id. at 16. He further averred that similar events took place on other occasions, and alleged a number of additional instances of discovering puncture marks on his body. The complaint alleges a total of sixteen such events.[4]

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[4] The sixteen instances were alleged as follows:

(1) On or about January 13, 1984, by petitioner McIntyre and two prisoners (described in text, supra) (id. at 15);

(2) on or about January 27, 1984, by petitioner McIntyre and two prisoners (described in text, supra) (id. at 16);

(3) on March 23 by someone respondent believed to be petitioner Perdoni, based on respondent's discovery of needle marks on his body (id. at 16-17);

(4) on June 29, 1984 (similar allegations to (3), supra) (id. at 17);

(5) on August 4, 1984 (similar allegations to (3), supra) (id. at 17-18);

(6) on August 23, 1984 (similar allegations to (3), supra) (id.);

Exhibit H to the Third Complaint is a

(7) on September 11, 1984, by petitioners Price and Fitzgerald, based on the discovery of a needle mark (id. at 18);

(8) on September 16, 1984, by petitioner Price, based on the discovery of needle marks (id.);

(9) on September 21, 1984, possibly by petitioner Perdoni or McIntyre, based on the discovery of needle marks, and because, on awakening, respondent felt nauseous (id. at 18-19);

(10) on September 26, 1984, by petitioner McIntyre, based on the discovery of a needle mark (id. at 19);

(11) on October 8, 1984, by petitioner McIntyre, based on the discovery of a needle mark (id.),

(12) on October 26 or 27, 1984, by petitioner McIntyre, based on the discovery of a needle mark (id. at 19-20);

(13) on November 22 or 23, 1984, by petitioner McIntyre, based on the discovery of needle marks (id. at 20);

(14) on December 5, 1984, by petitioner Tomlinson, based on the discovery of needle marks (id.);

(15) on December 9, 1984, by petitioner McIntyre, based on the discovery of needle marks (id. at 21); and

(16) on December 10, 1984, by petitioner McIntyre, based on the discovery of a needle mark. (id.)

declaration from another prisoner indicating that on January 13, 1984, the declarant saw petitioner McIntyre unlock the respondent's cell door and two other prisoners enter the cell. When the declarant returned from a shower, he averred, he noticed that respondent was being sexually assaulted by the two other prisoners. After the two prisoners left the cell, petitioner McIntyre locked respondent's door. The declarant also noticed petitioner McIntyre unlock respondent's door on January 27, 1984, and saw two prisoners enter the cell.

Respondent also alleged that he was harassed and verbally abused by petitioner Smith and other officers on November 22, 1983, (Third Complaint at 14) and that petitioner Smith assaulted respondent by pulling his arm and wrist and pinning him by the neck against the wall on December 19, 1983. Id. at 15. The respondent attached two affidavits from fellow prisoners. One

described petitioner Smith as grabbing respondent by the arm and wrist and slamming him against the wall (Attachment F); the other described Smith as pinning respondent by the neck and twisting his right arm. Attachment G.

4. Civ. S-84-1074-LKK
Civ. S-84-1198-LKK

These two cases were not appealed to the court of appeals. The Magistrate Judge recommended dismissal of these two cases in the same opinion recommending dismissal of the three cases discussed above. The opinion of the Magistrate Judge discusses them in conjunction with Civ. S-85-0084-LKK, supra. The opinion characterizes these two cases that respondent did not appeal, as well as S-85-0084, supra, as follows:

> These complaints all allege that plaintiff was drugged and assaulted by prison guards at Vacaville. Each complaint alleges that different guards were responsible for the assault and alleges that the assaults were wholly

> separate incidents. The rapes allegedly occurred on different nights, spanning the period from August, 1983 to November, 1984.

Magistrate's Findings and Recommendations, 4/16/86, p.4.

In dismissing all five complaints, the Magistrate Judge said that "[a]lthough each complaint taken separately, is not necessarily frivolous, a different picture emerges from a reading of all five complaints together." Id. at 5. The Magistrate Judge concluded that, in light of all five complaints, the facts alleged appeared "wholly fanciful," and therefore dismissed the complaints as frivolous. Id.

On May 5, 1986, the district court entered judgment against respondent. Respondent appealed the dismissal of the first three of the five cases discussed above.

The court of appeals vacated the dismissals in Hernandez v. Denton, 861 F.2d

1421 (9th Cir. 1988). In Denton v. Hernandez, 110 S.Ct. 37 (1989) (mem.), this Court remanded for further consideration in light of Neitzke v. Williams, 490 U.S. 319, 109 S.Ct. 1827 (1989). The court of appeals subsequently issued a new opinion, again vacating the dismissals. Hernandez v. Denton, 929 F.2d 1374 (9th Cir. 1991). This Court granted a writ of certiorari on November 4, 1991.

SUMMARY OF ARGUMENT

This Court should reject the argument of the Magistrate Judge below that complaints that are not individually frivolous become frivolous when taken together. Taken to its logical conclusion, the approach of the Magistrate Judge would allow the presence of improbable allegations in the same or other complaints to bar the adjudication of plausible allegations, with the result that the respondent prisoner in this case would

always be barred from federal court as long as he were to remain indigent.

The radical implications of the rationale for dismissal of the Magistrate Judge are demonstrated by the dismissal of respondent's allegations of deprivation of shoes for thirty days, and of physical abuse by guards. These allegations raise no issues of factual implausibility. While these claims may require amendment or the naming of additional parties in order to survive a Fed.R.Civ.P. 12(b)(6) motion, Neitzke v. Williams, 490 U.S. 319 (1989), counsels that complaints with such defects should not be dismissed under §1915.

While many of the twenty allegations of sexual assault made by respondent are alleged on the apparent basis of finding unexplained needle marks or on a similar basis, some of the allegations of rape stand on a different footing. In one of the allegations, the respondent directly alleges

that he was raped by an identified petitioner. Another allegation is supported by an affiant who states that he saw the respondent raped while he slept by two prisoners, and that the prisoners were allowed into the cell by an identified petitioner. While respondent's implausible additional allegations of sexual assault may undermine the credibility of these allegations, they do not render them frivolous. To dismiss all of respondent's allegations of sexual assault without any factual inquiry is to leave him without access to legal protection and to ignore the possibility that a real event may have triggered the later repeated and stereotyped allegations of sexual assault.

As set forth in Neitzke, Congress intended that indigent persons enjoy meaningful access to the courts, and that legislative policy judgment must be respected. At the same time, enforcing

§1915 as written by Congress does not preclude the federal courts from the use of appropriate evidentiary mechanisms short of trial that will effectively winnow out frivolous cases while preserving access to the federal courts.

ARGUMENT

I. THE PRESENCE OF IMPLAUSIBLE ALLEGATIONS IN THE SAME OR A RELATED COMPLAINT DOES NOT JUSTIFY THE DISMISSAL OF PLAUSIBLE ALLEGATIONS

In this case an indigent, unrepresented person, apparently under treatment for mental problems, has alleged a number of events. Some of the alleged events, taken by themselves, cannot be said to be inherently implausible. Other alleged events are highly implausible in themselves. The issue is whether the presence of implausible allegations in the same complaint, or in a separate complaint filed by the same indigent person, so contaminates the plausible allegations that all the

allegations should be dismissed as frivolous under the provisions of 28 U.S.C. §1915(d) without examination of the plausible allegations.

The amici urge the Court to reject, as inconsistent with Neitzke, the conclusion of the Magistrate Judge below that complaints that are not individually frivolous become frivolous when viewed together.

The presence of highly improbable allegations may undermine the credibility of the other allegations, but should not become an absolute bar to resolution of the plausible allegations. If this Court reverses the court of appeals, the Court's decision will bar the adjudication of plausible allegations whenever implausible allegations are also present. As a result, many litigants in respondent's position will be effectively precluded from vindicating their rights in federal court.

In particular, mentally ill prisoners are almost always indigent. Many such prisoners are also extremely vulnerable to exploitation, including sexual abuse, by other prisoners. Moreover, mentally ill prisoners can be irritating to staff, and may be less able than other prisoners to control their behavior and conform to prison rules. Thus, mentally ill prisoners are at increased risk of both abuse by other prisoners and use of force by staff.

At the same time, some mental illnesses, such as schizophrenia, can result in delusions and even hallucinations. A prisoner with such an illness may remember an event in a distorted manner; conflate two or more events; or imagine events that never took place.

Thus, it is quite possible that a complaint filed by a mentally ill prisoner will contain both factually accurate allegations of abuse by prisoners or staff,

and allegations that are, in whole or in part, a product of the prisoner's mental illness. To dismiss all complaints filed by a given prisoner, simply because some of the allegations in some of his or her complaints seem implausible, places such prisoners beyond the protection of the federal courts. If the presence of implausible allegations in Complaint A can lead to the dismissal as frivolous of otherwise plausible allegations in Complaint B, the prisoner in question can never file a non-frivolous complaint.

II. THE RESPONDENT'S COMPLAINTS SHOULD NOT HAVE BEEN DISMISSED AS FRIVOLOUS

The respondent's allegations can be classified into three general categories:

A. The allegations of deprivation of clothing and shelter.

The majority of the appellate panel, in its original decision, vacated the dismissal of the claim that respondent had been deprived of shoes for thirty days because, it held, respondent might be able

to state an Eighth Amendment claim by amending his complaint. Hernandez v. Denton, 861 F.2d at 1423. The dissent disagreed because, assuming that deprivation of a pair of shoes involved the wanton infliction of pain, respondent had not named as a defendant the person who denied him the shoes.

Given that respondent had alleged that the thirty-day deprivation of shoes occurred at a time when he had only one blanket and suffered from freezing weather conditions because his cell was across from broken windows, it cannot be said that this allegation is legally frivolous. Cf. Wilson v. Seiter, 111 S.Ct. 2321, 2327 (1991):

> Some conditions of confinement may establish an Eighth Amendment violation "in combination" when each would not do so alone, but only when they have a mutually enforcing effect that produces the deprivation of a single, identifiable human need such as food, warmth or exercise -- for example, a low cell temperature at night combined with a failure to issue blankets.

(Emphasis and citations omitted). See also DeShaney v. Winnebago County DSS, 109 S.Ct. 998, 1005-1006 (1989) (identifying clothing and shelter as basic human needs that the State is required to provide to an individual when it has rendered that individual unable to care for himself or herself).

It may be true that, at the time of the complaint, respondent failed to name an appropriate defendant. But there is no reason to believe that this defect could not be cured by an amendment to the complaint and the addition of appropriate parties. Particularly because respondent was unrepresented, it would be fundamentally unfair to dismiss this allegation simply because respondent had failed to name an appropriate defendant. In Neitzke, the Court noted that, if the indigent prisoner's

claim had been judged under the proper standard of Fed.R.Civ.P. 12(b)(6), he would have had an opportunity to amend his complaint before adjudication of the motion to dismiss. 109 S.Ct. at 1834. Failure to name a necessary party is also ordinarily addressed through a Fed.R.Civ.P. 12(b)(6) or (b)(7) motion. See Fed.R.Civ.P. 12(b). Accordingly, under the rationale of Neitzke, the respondent should have been given an opportunity to replead prior to dismissal. See also Haines v. Kerner, 404 U.S. 519, 520 (1972) (indigent prisoners should not be denied the opportunity to present evidence on a claim because of inartful pleading).

B. The allegations of abuse.

As noted in the Statement of the Case, the respondent alleged that he suffered both verbal and physical abuse from staff. Complaint Civ. S-85-0084-LKK alleges that respondent was assaulted by petitioner Smith, who slammed respondent against the

wall, pinned his neck, and pulled or twisted his arm.

These allegations state a claim under the Eighth Amendment. See, e.g., Felix v. McCarthy, 939 F.2d 699, 701-702 (9th Cir. 1991), (holding that a prison guard violated well-settled law in 1985 by throwing a prisoner across a hall against a wall, causing bruises, soreness and emotional damage).

This Court has under review a case that could change the law to impose a "significant injury" requirement in prison abuse cases. Hudson v. McMillian, 111 S.Ct. 1579 (1991) (mem.), granting cert. to 911 F.2d 727 (5th Cir. 1990).[5] But even if this

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[5] Every court of appeals, other than the Fifth Circuit, that has considered the issue has rejected a "significant injury" requirement as a prerequisite for stating an Eighth Amendment claim against staff for prisoner abuse. See Gray v. Spillman, 925 F.2d 90, 93 (4th Cir. 1991) (rejecting serious injury requirement under Fifth and Fourteenth Amendments and construing King v. Blankenship, 636 F.2d 70, 72 (4th Cir. 1980) (prison case) as specifically

Court were to impose a "significant injury" requirement in Hudson, Neitzke counsels that the sufficiency of respondent's claim should be considered under Rule 12(b)(6) rather than §1915(d), so that respondent would have an appropriate opportunity to amend the complaint to allege what, if any, injuries he suffered as a result of the incident.

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rejecting a serious injury requirement); McHenry v. Chadwick, 896 F.2d 184, 187 (6th Cir. 1990); Corselli v. Coughlin, 842 F.2d 23, 26 (2d Cir. 1988); Burton v. Livingston, 791 F.2d 97, 100 (8th Cir. 1986); Norris v. District of Columbia, 737 F.2d 1148, 1151 (D.C. Cir. 1984). See also H.C. by Hewett v. Jarrard, 786 F.2d 1080, 1086 (11th Cir. 1986) (gratuitously slamming juvenile prisoner against wall, resulting in no permanent injuries, violated due process clause); Black v. Stephens, 662 F.2d 181 (3d Cir. 1981) (display of revolver with threat to kill). Cf. Brown v. Hughes, 894 F.2d 1533, 1538 (11th Cir. 1990) ("Deliberately inflicted pain, as with an electric cattle prod, does not become unimportant and unactionable under the Eighth Amendment simply because the pain produced is only momentary"). Moreover, the Fifth Circuit has held, in its most recent relevant decision, that its "significant injury" requirement can be satisfied by a showing that the prisoner endured pain and suffering significant enough to justify monetary relief. McCord v. Maggio, 927 F.2d 844, 849 (5th Cir. 1991).

The need to apply the Neitzke rule is particularly great in this case because, at the time he filed his complaint, respondent could not have foreseen the necessity of alleging a "significant injury" as a result of the assault.

C. The allegations of rape.

The three complaints that respondent appealed to the court of appeals allege a total of twenty separate instances of rape.[6] The petitioners allege in their Statement of the Case at p.5 that "respondent had no personal recollection of any of the assaults but deduces that they occurred from his claimed discovery of fecal and semen stains on his T-shirts and perceived needle wounds on his arms and legs." A similar

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[6] The court of appeals (see, e.g., 929 F.2d at 1376) and the petitioners (see, e.g., Petitioners' Brief on the Merits at 5) repeatedly refer to twenty-eight allegations of rape. This number apparently includes allegations of rape made in the two complaints that respondent did not appeal to the court of appeals.

characterization of the record occurs in the amicus brief of the United States. See Brief at p.2. (Citing the petition for writ of certiorari at 4).

This characterization, while correct for many of the alleged incidents of rape, is not accurate for the incident alleged in Civ. S-83-0645-LKK to have occurred on July 29, 1982. That complaint avers flatly that respondent was raped and sexually assaulted at the stated time and place. The complaint does not indicate that his only knowledge of the rape came from finding stains on his clothing; on the face of the complaint, the respondent is simply mentioning the stained clothing as evidence that the rape took place.

In Civ. S-83-1358-LKK respondent states that he "believed" that he was raped, on July 29, 1983, and the supporting affidavit from another prisoner indicates

that the event took place while the respondent was asleep.

It seems unlikely that two prisoners could have raped respondent while he slept. However, the prisoner affiant would have been in a better position to determine that respondent was being sexually assaulted than to determine whether respondent was asleep, comatose, or apparently non-responsive for some other reason, including reasons related to his apparent mental condition. Neither of the latter possibilities are so intrinsically implausible that dismissal of this allegation as frivolous is justified.[7]

The credibility of these two allegations of sexual assault may seem undermined by the other allegations of assault. However, in the context of a prison, allegations of repeated rape are not

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[7] For similar reasons the allegations of rape on January 13 and 27, 1984, made in Civ. 83-0084-LKK, and supported by a declaration of a fellow prisoner, should not be dismissed as frivolous.

intrinsically less credible than allegations of a single sexual assault. Prisoners who are known to have been victims of sexual assault are frequently at substantially increased risk for further sexual victimization.[8] While the particular nature of the additional allegations of sexual assault in this case raises obvious questions about the credibility of respondent,[9] these allegations cannot by

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[8] See W. Wooden and J. Parker, Men Behind Bars: Sexual Exploitation in Prison 1-7, 99-120 (1982) (based on study conducted in the California prison system).

[9] While it is of course hazardous to engage in speculation on an undeveloped record, one plausible hypothesis is that the stereotyped additional allegations of sexual assault represent, in a distorted form, the respondent's attempt to communicate about an earlier, real event that was traumatizing to him. See Comprehensive Textbook of Psychiatry 669 (H. Kaplan and B. Sadock ed. 4th ed. 1985); (Many events, including rape, can precipitate schizophrenia in vulnerable individual; symptoms of the illness may be seen as a way of expressing meaning of initiating event); see also The Harvard Guide to Modern Psychiatry, 220 (A. Nicholi ed. 1978).

themselves render non-frivolous allegations frivolous.

The comments of the court of appeals regarding the sexual assault allegations suggest a similar approach. See, e.g., Hernandez v. Denton, 929 F.2d at 1376:

> The defendants ask us to hold that Hernandez' allegations of 28 rapes are "fantastic or delusional scenarios," and affirm the district court's dismissal. If we were to affirm the district court's dismissal of all the claims as factually frivolous, however, we would have to hold that all 28 rapes were delusions and that none of them occurred. While it is hard to believe that so many similar incidents actually happened, we cannot say that none of them occurred without making the kinds of credibility determinations that are impermissible in deciding whether a claim is baseless under section 1915.

(Citation omitted).

III. MECHANISMS FOR WINNOWING CASES UNDER §1915 MUST BE CONSISTENT WITH NEITZKE

Of course, deciding that a mentally ill prisoner is so likely to fail to be a credible witness at trial that he or she is unlikely to prevail would be a very simple shortcut to dispose of cases. But this is precisely the shortcut rejected by the Court in Neitzke:

> We recognize the problems in judicial administration caused by the surfeit of meritless in forma pauperis complaints in the federal courts, not the least of which is the possibility that meritorious complaints will receive inadequate attention or be difficult to identify amidst the overwhelming number of meritless complaints. Nevertheless, our role in appraising petitioners' reading of §1915(d) is not to make policy, but to interpret a statute. Taking this approach, it is evident that the failure to state a claim standard of Rule 12(b)(6) and the frivolousness standard of §1915(d) were devised to serve distinctive goals, and that while the overlap

> between these two standards is considerable, it does not follow that a complaint which falls afoul of the former standard will invariably fall afoul of the latter. Appealing though petitioners' proposal may appear as a broadbrush means of pruning meritless complaints from the federal docket, as a matter of statutory construction it is untenable.

(Citation omitted).

The appropriate mechanism for dealing with complaints such as those filed by respondent is not to dismiss them summarily in toto. Rather, as respondent has suggested, the better approach is to develop an efficient system for reviewing cases short of trial. Indeed, Fed.R.Civ.P. 12(d) specifically provides for preliminary hearings for defenses raised pursuant to 12(b)(1) through (7). See generally Wright & Miller, Federal Practice and Procedure: Civ. 2d §1373 (1990).

Both the Fifth and Tenth Circuits have developed other possible approaches to the

problem.[10] In the Fifth Circuit, the procedure is known as a "Spears hearing." Under that procedure, a magistrate judge conducts an evidentiary hearing to determine whether the complaint should be dismissed as frivolous. The proceeding is in the nature of a motion for a more definite statement. See Spears v. McCotter, 766 F.2d 179, 181-182 (5th Cir. 1985). See also Wilson v. Barrientos, 926 F.2d 480, 482 (5th Cir. 1991) (Spears hearing promotes the twin goals of assuring meaningful access to the

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[10] In amici's view, such truncated procedures, while preferable to summary dismissal, nevertheless raise obvious due process concerns. If constitutionally permissible in this context, it is only because §1915(d) bestows on district judges "the unusual power to pierce the veil of the complaint's factual allegations and dismiss those claims whose factual contentions are clearly baseless." Neitzke, 109 S.Ct. at 1833. For similar reasons, amici believe that truncated procedures that rely on the judgment of a magistrate judge to clarify the record are preferable to those that initially rely on the judgment of prison officials.

federal courts and eliminating meritless cases from the federal docket).

The Tenth Circuit uses a "Martinez report," which is an administrative record compiled by the correctional authorities. See Martinez v. Aaron, 570 F.2d 317 (10th Cir. 1978). See also El Amin v. Pearce, 750 F.2d 829, 832 (10th Cir. 1984) (purpose of "Martinez report" is to determine jurisdiction and clarify issues; it does not authorize the substitution of prison officials for the court as fact-finders).

If respondent were allowed to amend his complaint and add relevant parties, as contemplated by the decision of the court of appeals, a procedure short of full trial may well prove useful. For example, examination of the cellhouse logs and staffing rosters from the dates of the alleged events may clarify whether dismissal is appropriate for some allegations. The respondent's medical records may also prove helpful.

Whatever procedure is adopted, however, it must be consistent with the twin goals of winnowing meritless cases and preserving meaningful access to the courts. Anything less places respondent literally beyond the ken of the courts. Under the logic of the Magistrate Judge's construction of §1915(d) as allowing dismissal of all of respondent's complaints as frivolous because some of the allegations were of questionable credibility, this respondent presumably can never file a non-frivolous complaint. Such a result would be manifestly inconsistent with congressional intent in enacting §1915 and unconscionable as a matter of policy.

CONCLUSION

For the above reasons, the amici urge the Court to affirm the decision of the court of appeals.

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No. 90-1846

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1991

GEORGE F. DENTON, et al., Petitioners,

v.

MIKE HERNANDEZ, Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONERS' SUPPLEMENTAL BRIEF

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PRELIMINARY STATEMENT

Petitioners submit the following citations to supplement the argument advanced by the United States as amicus curiae.

ARGUMENT

THE NINTH CIRCUIT HAS RULED THAT A PLEADING NOT WELL GROUNDED IN FACT UNDER RULE 11 IS FRIVOLOUS

The United States, as amicus curiae, has suggested that factual allegations are frivolous under section 1915(d) if no reasonable attorney or paying litigant would certify that they are "well grounded in fact" within the meaning of Rule 11 of the Federal Rules of Civil Procedure. **Brief for the United States** at 12. The Ninth Circuit, in an attempt to define sanctionable cases under Rule 11, has equated "not well-grounded in fact" with "frivolous". *Townsend v. Holman Consulting Corp.*, 929 F.2d 1358, 1362 (9th Cir. 1991). *Townsend* states:

> The word "frivolous" does not appear anywhere in the text of [Rule 11]; rather, it is a shorthand that this court has used to denote a filing that is both baseless and made without a reasonable and competent inquiry.

The Ninth Circuit, having reconciled the term "frivolous" and "not well grounded in fact", appears to have anticipated the logic of the United States in its amicus curiae brief.

DATED: February 13, 1992

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AFFIDAVIT OF SERVICE BY MAIL

STATE OF CALIFORNIA)
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CYNTHIA BAIN, being first duly sworn on oath deposes and states:

I am 18 years of age or older and not a party to the within entitled cause; my business address is 1515 K Street, Suite 511, Sacramento, California 95814.

On February 14, 1992, I served the attached **PETITIONERS' SUPPLEMENTAL BRIEF** in said cause, by placing three true copies thereon fully prepaid, in the United States mail at Sacramento, California, addressed as follows:

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Subscribed and sworn to before
me this 14th day of February, 1992.

Rosalind Zender
Notary Public in and for said County and State

ROSALIND ZENDER
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COUNTY OF SACRAMENTO
My Commission Expires March 14, 1995